

REPORT

ON

PENSIONS AS FAMILY PROPERTY: VALUATION AND DIVISION

ONTARIO LAW REFORM COMMISSION



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ONTARIO LAW REFORM COMMISSION



The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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**Ontario
Law Reform
Commission**

The Honourable Marion Boyd
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on Pensions as Family Property:
Valuation and Division*.

John D. McCamus
Chair

Richard E. B. Simeon
Vice Chair

Nathalie Des Rosiers
Commissioner

Sandra Rodgers
Commissioner

Vibert Lampkin
Commissioner

March, 1995

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PREFACE

In 1965, this Commission initiated a research project on family law. The project had the ambitious objective of analyzing all existing laws within provincial jurisdiction that affect family relations, in the light of the impact of economic and social changes on the family. The objective was to identify the basic principles of a modern code of family law and to suggest appropriate legislation to implement them. The resulting *Report on Family Law* (1969-1974) was released in six parts, dealing with torts, marriage, children, family property law, family courts, and support obligations. This report played a role in sparking legislative interest in family law reform and resulted in the enactment of the *Family Law Act, 1986*.

Nearly two decades have passed since the Commission last addressed family law. In the intervening years, changes in social mores and the economy have had a dramatic impact on the nature of family life. The most profound change is the increasing diversity of family forms in which individuals choose to live. At the same time, our society's commitment to equality has evolved through the development of human rights jurisprudence and the *Canadian Charter of Rights and Freedoms*. The passage of time has brought to light practical difficulties in implementing earlier reforms. We believe that, in general, the initial scheme of reform remains valid, but that some technical amendments are necessary to ensure that the legislation achieves its objectives. As well, some aspects of family law must be overhauled to reflect contemporary social realities and values.

As part of our new family law reform programme, the Commission is issuing three reports concerning the *Family Law Act*. In the *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (1993), we address the need to expand the application of the provisions of the *Family Law Act* to encompass a greater diversity of family forms. In the other two reports, we examine special problems that have become apparent in implementing the property-sharing provisions of the current legislation. In the *Report on Family Property Law* (1993), we propose amendments to the statutory scheme to provide for the sharing of the value of family property between spouses. In the present report, the *Report on Pensions as Family Property: Valuation and Division* (1995), we propose reforms to the law concerned with the sharing of a particular type of property that has distinct characteristics and raises special problems—the pension. While the legislative goal of ensuring that spouses share the product of their joint efforts remains legitimate today, in these two reports we make recommendations designed to improve the fairness and efficiency of the scheme and to ensure that it achieves this objective.

We consider the recommendations contained in these reports to be essential in ensuring that the law responds adequately to the needs of individuals and that it protects the integrity of family life. No reform of family law will be “final”, however. This area of law touches an aspect of society that is in a constant state of evolution. As a result, its reform is an ongoing task. If, as we wish, these reports represent an important stage on the path to reform, we acknowledge that they cannot be the last word on the subject.

ACKNOWLEDGMENTS

The Commission is very much indebted to Barbara Hendrickson, Counsel at the Commission, who assumed principal responsibility for the preparation of this report. We are also grateful to Cora Calixterio and Tina Afonso for their secretarial contributions and to Doreen Potter, Rosemary Shipton, and Mary McDougall Maude for their editorial assistance.

The pension concepts and the law discussed in this report are extremely complex. The Commission is fortunate to have had the benefit of two earlier reports in this area by the Law Reform Commission of British Columbia and the Alberta Institute of Law Research and Reform. The Commission is particularly indebted to Thomas G. Anderson, Commissioner of the Law Reform Commission of British Columbia, for his advice and assistance.

The Commission is also very grateful to David Short, of the actuarial firm of Eckler Partners Ltd., for his advice and technical assistance regarding all aspects of the report and, in particular, the actuarial issues. Sarah Boulby, former Counsel at the Commission, was responsible for the early development of the project. Background research papers were prepared for the Commission by Professor William Flanagan, of the Faculty of Law, Queen's University; Cheryl Hass, of the Alberta Bar; and Donald Bur and Jody Morrison, Counsel at the Commission. Melissa Merker, Counsel at William Mercer Inc., provided helpful advice at an early stage of the Commission's work.

Consultation with experts in this field was extensive and proved to be invaluable to the Commission. Those whom we consulted included Debbie Lyon, of the Manitoba Pension Commission; Bruce Macnaughton, of the Pension Commission of Ontario; Roger Barton, of the Ontario Teachers' Pension Plan Board; Sherry Cohen, of the Ontario Ministry of Labour; Dona Campbell, of the firm Sack, Goldblatt, Mitchell; John Corp, of Eckler Partners Ltd.; John Melvin Norton, of MLH+A inc.; Ruth Mesbur, of the Ontario Bar; Jerry Williams, of the Ministry of Finance; Sheryl Smolkin and Keith McComb, of The Wyatt Company; and Bo Pawlik, of the Ontario Pension Board.

The Commission would also like to express its appreciation to Professor E. Diane Pask, of the Faculty of Law, University of Calgary, for her early assistance in introducing the Commission to the issues relating to pension division on marriage breakdown and in providing advice concerning the formulation of the project. The Commission is also grateful to Sarah Kraicer, of the Policy Development Division of the Ministry of the Ontario Attorney General, and Leslie Pearl, of the Ontario Women's Directorate.

CHAPTER 1

INTRODUCTION

1. PENSIONS AS FAMILY ASSETS

The law of Ontario imposes certain rights and obligations on spouses when a marriage breaks down.¹ More particularly, the *Family Law Act*² sets forth a scheme for dividing assets acquired by a couple during marriage. This scheme requires that the value of assets determined by the Act to constitute “net family property”³ must be shared equally between the spouses. Pension assets are included in the definition of “property”⁴ and thus must be part of the equalization process set out in the Act.

For many Canadian couples, pension plans are valuable assets. If the couple does not own a home, it is likely that the pension is the most valuable asset owned by either spouse. On marriage breakdown, therefore, the division of pension assets is often an important part of the family property equalization process.

The valuation and division of pensions in Ontario presents many problems. Currently, the law contains no special provisions for valuing pensions and gives little guidance on the appropriate methods to use. Couples face considerable difficulty and expense in valuing these assets for *Family Law Act* equalization purposes. The *Family Law Act* merely requires that a member of a pension plan share the value of the pension as of the date of separation with his or her spouse. Since there are no standard guidelines for the various economic assumptions and methods that must be used, the parties and their lawyers spend considerable time negotiating questions of valuation. Failure to agree on these issues often results in lengthy judicial proceedings.

¹ The Ontario Law Reform Commission has chosen to use terminology in this report consistent with the current provisions of the *Family Law Act*, R.S.O. 1990, c. F.3, with respect to the definition of “spouses”. In an earlier report, the Commission recommended that the property division scheme found in the *Family Law Act* be extended to “cohabitants”: *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ministry of Attorney General, 1993).

² *Supra*, note 1.

³ *Ibid.*, s. 4(1) “net family property”.

⁴ *Ibid.*, s. 4(1) “property”.

It is the future and contingent nature of pension assets that makes them difficult to value. Although the law gives some guidance on how to value pension benefits, assumptions made by courts about appropriate methods have often differed and the results have often been inconsistent. As a result, the valuation and division of pensions tends to be expensive. Spouses retain actuaries to provide them with valuations and lawyers to deal with the complexities of the current law. The Commission has concluded that the process of valuing pension property under the *Family Law Act* needs reform.

The unrealizable nature of pension assets has also caused difficulties. Because pensions cannot, in most cases, be realized at the time of marriage breakdown, it is often difficult to meet an equalization obligation where one of the family assets is a large pension. Other types of assets are required to meet the obligation. However, in many cases, the spouse who is the member of the pension plan may not have sufficient non-pension assets to satisfy the equalization requirement.

Before 1988, spouses attempted to divide pension assets by entering agreements requiring the member spouse to pay to, or hold as trustee for, the non-member spouse a portion of the ultimate pension payments. In 1988, reforms were introduced in Ontario to facilitate the division of pensions.⁵ The reforms enable a trust to be imposed on plan administrators to pay out a share of pension benefits "if and when" the pension comes into pay. However, it appears that, notwithstanding the 1988 reforms, many "if and when" agreements or orders are unenforceable because of various technical problems.

For these and other reasons, the Commission has determined that the 1988 reforms are deficient in many respects. Under current Ontario law, the pension division process on marriage breakdown is both complicated and unsatisfactory. In recent years, further reforms have been recommended in Ontario,⁶ but no legislative change has resulted. Given the importance of this subject, the Ontario Law Reform Commission determined that a study of the division of pensions should be given priority among current family law reform issues.

⁵ *Pension Benefits Act, 1987*, S.O. 1987, c. 35, s. 52. See, now, *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 51 (subsequent references are to the 1990 Act).

⁶ Ontario, Ministry of Financial Institutions (now Ministry of Finance), *Building on reform: Choices for tomorrow's pensions* (March 1989).

2. TERMINOLOGY

Pensions are complex assets and this is reflected in pension terminology. In this report, the Commission proposes a scheme for the division of pensions at source, and to make this scheme comprehensible not only to professionals who deal with pension issues, but also to others who will be affected by the scheme, it is imperative that the scheme be described in accessible language. To this end, the Commission has developed a simplified set of pension terms.⁷

Some of the terms are by necessity based on definitions found in the Ontario *Pension Benefits Act*.⁸ Others are based on terminology found in the proposals of the Law Reform Commission of British Columbia.⁹ The remaining terms are unique to this report. The “non-member spouse” is the spouse who is not a member of the plan, and the “member spouse” or “member” is the spouse who participates in the plan as a member. “Spouse” includes former spouses and “member” includes former members. “Pension division at source” or “pension division” refers to the process of dividing the actual pension asset on marriage breakdown and includes a “transfer” and a “benefit split”. A “transfer” involves the non-member spouse transferring a dollar amount of the “commuted value” or the “accumulated value” out of a pension asset into another “pension vehicle”. A “pension vehicle” is a locked-in scheme that provides for retirement income. This includes a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*,¹⁰ a locked-in deferred annuity, or another registered pension plan. Where the spouses opt for the “transfer” of an amount out of the member’s plan to another “pension vehicle”, the non-member spouse acquires no special rights in the member’s pension. Where the spouses opt for a “benefit split”, the non-member spouse acquires a right to a periodic payment in the future and certain rights with respect to his or her share of the pension asset.

⁷ See, also, Appendix A, *infra*, for a glossary of pension terms developed by the Pension Commission of Ontario.

⁸ *Supra*, note 5.

⁹ Law Reform Commission of British Columbia, *Report on the Division of Pensions on Marriage Breakdown* (Report No. 123) (Vancouver: Ministry of Attorney General, January 1992). The proposed legislation set out in this report is reproduced *infra*, Appendix D.

¹⁰ *Pension Benefits Act*, *supra*, note 5, s. 42(1)(b). “Prescribed retirement savings arrangements” are defined in the regulations to the *Pension Benefits Act*, R.R.O. 1990, Reg. 909, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

3. PRINCIPLES UNDERLYING REPORT

In exploring options for legislation to provide for the sharing of pension assets on marriage breakdown, the Commission has been guided by a number of principles.

First, the underlying principle of the *Family Law Act*—that family property should be shared equitably—is of cardinal importance. We believe that any proposals for dealing with pension assets should be in accordance with the provisions of the *Family Law Act* and current notions of spousal contributions to family property.

Secondly, the Commission believes that the overall regime for dealing with pensions on marriage breakdown should be flexible enough to accommodate the different needs and circumstances of the individual spouses. In the Commission's view, spouses should not be restricted to a single solution to the problem of ensuring equitable sharing of pension assets. In the recommendations that follow, we attempt to allow spouses to select, from a number of solutions, the one that is most suitable to their needs.

Thirdly, the Commission is mindful that the overall purpose of pensions, from the point of view of both individuals and society, is to provide adequate income on retirement. Thus, the Commission believes that any division of the pension asset at source should attempt to preserve the asset for both spouses until retirement.

Fourthly, in the interest of minimizing costs to spouses involved and reducing the need for litigation, we have attempted to simplify the process of valuing pensions as much as possible by recommending a set of workable and clear rules and procedures for pension valuation.

Fifthly, the Commission is aware of the cost of pensions to employers and the need to provide a process of pension division at source that does not place an undue financial burden on pension plan sponsors. In our recommendations, we have attempted to minimize administrative costs and complexity for those who manage and administer pension plans. In particular, the Commission has been concerned to ensure that our proposals do not unnecessarily increase pension plan funding requirements.

Sixthly, the Commission believes that any scheme for pension division at source should not be restricted to married couples. In our *Report on the Rights*

and *Responsibilities of Cohabitants under the Family Law Act*,¹¹ we suggested that, for reasons of fairness, the equalization scheme set out in the *Family Law Act* should be available, in certain circumstances, to unmarried heterosexual couples and to a newly defined category of Registered Domestic Partners. Consistent with this approach, it is our view that the recommendations set out in the present report should similarly be applicable to such couples.

Finally, it is our view that a pension division scheme should provide for the maximum possible disengagement of spouses once separation has occurred. In devising our pension division-at-source scheme, the Commission seeks to ensure that entitlement to pension income by the non-member spouse will be independent, to the greatest extent possible, of the decisions or circumstances of the member spouse.

These principles were identified by the Commission in the early stages of our work on this issue and provide the basis for the policy directions taken in our proposals. The principles do not always lead in the same direction, and it has been necessary to look for an appropriate balance on many issues. For example, the Commission wishes to ensure the preservation of pension assets for the future use of both parties, but we also wish to provide the parties with a range of options for facilitating an equalization of family property that includes pension assets. Similarly, while the Commission wishes to design a scheme that provides a means of valuing and dividing pensions at a reduced cost to spouses, we do not wish to do so by making pension plan administrators totally responsible for valuation and division. In addition, while the Commission supports the concept of maximum disengagement of spouses' interests at the time of marriage breakdown, we also recognize that, in some cases, it might be beneficial for the non-member spouse to opt for a benefit split that might depend on future decisions and activities of the member spouse.

4. OUTLINE OF REPORT

The Commission deals with four areas of pension reform in this report: the status of so-called "if and when" agreements and orders under section 51 of the *Pension Benefits Act*; guidelines for the valuation of pensions for equalization purposes under the *Family Law Act*; the creation of two additional settlement options—a transfer and a benefit split—where one of the family assets is a pension; and the division of Canada Pension Plan (CPP) benefits under the *Family Law Act*.

¹¹ *Supra*, note 1.

Chapter 2 introduces the reader to basic pension concepts. Pension law and pension law reform are complex subjects. To understand the reform proposals set out in this report, one must have a basic understanding of pensions and their valuation. We have attempted to provide a convenient guide in chapter 2. Also included, as Appendix A, is a glossary of pension terminology.

Chapter 3 describes the current law applicable to pensions in the context of marriage breakdown. It provides an account of the current regime for pension division at source under the *Family Law Act* in Ontario. It discusses the currently available options for pension division, as well as problems that have arisen regarding the creation and enforcement of "if and when" agreements under the current provisions of the *Pension Benefits Act*.¹² The Commission has recommended that our proposed pension division-at-source scheme apply, for the most part, retroactively to existing pension division arrangements made by agreement or by court order.

Chapter 4 discusses pension division-at-source law and pension law reform proposals in other Canadian jurisdictions. The chapter describes pension division mechanisms established in other Canadian provinces, as well as those in place for federally regulated pensions. We also describe the recommendations of the Law Reform Commission of British Columbia,¹³ the Alberta Institute of Law Research and Reform,¹⁴ and the Ministry of Financial Institutions of Ontario¹⁵ on this subject.

In chapter 5 of the report, we develop a set of standard procedures for pension valuation and recommend that they be prescribed by regulation. We hope that by stipulating the method and assumptions to be relied on in pension valuation, it will be possible to minimize the expense, delay, and litigation produced by disputes in this area under current law. The Commission has been greatly assisted in this task by the Standard of Practice adopted by the Canadian Institute of Actuaries in 1993.¹⁶ The Standard of Practice addresses several major issues that have proved to be problems in the valuation process. There are, however, a number of valuation issues not resolved by the Standard of Practice.

¹² *Supra*, note 5, s. 51.

¹³ *Supra*, note 9.

¹⁴ Alberta Institute of Law Research and Reform (now Alberta Law Reform Institute), *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*, Report No. 48 (Edmonton: June 1986).

¹⁵ *Supra*, note 6.

¹⁶ Canadian Institute of Actuaries, *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments* (September 1, 1993), reproduced *infra*, Appendix B.

We have attempted to identify these problems and to provide solutions in chapter 5.

Chapter 6 deals with a number of preliminary considerations that the Commission addressed in devising a pension division-at-source scheme. These issues concern the relationship of the current regime for property sharing under the *Family Law Act* to a division-at-source regime and the basic structure of the scheme.

Chapter 7 sets out the features of our proposed scheme for pension division at source. As we noted above, under current Ontario law, spouses may experience considerable difficulty in satisfying an equalization payment where there is a large pension asset. The only method available under current law—"if and when" arrangements—gives rise to a variety of problems. Under our proposals, spouses will have two new options available, each of which will enable division of a pension asset at source. The first is a transfer of a portion of the value of the pension at the time of marriage breakdown to another pension vehicle. The second is a benefit split, in which the non-member spouse will gain a right to pension income either on an immediate or a deferred basis. The scheme proposed by the Commission contemplates different methods of pension division for different types of pensions (defined benefit plans and defined contribution plans), depending on whether they are matured or unmatured. The Commission was greatly assisted in developing our scheme for pension division at source by the recent report of the Law Reform Commission of British Columbia.¹⁷

In chapter 8, the Commission addresses the division of CPP benefits. The *Canada Pension Plan*¹⁸ makes credit splitting of pension benefits mandatory for spouses after marriage breakdown. The legislation further provides, however, that spouses may opt out of the federal legislative scheme if there exists provincial legislation permitting them to do so. In Ontario, no such legislation has been enacted. The Commission makes recommendations in chapter 8 concerning the mandatory nature of credit splitting of CPP benefits, as well as the relationship of those benefits to the *Family Law Act* equalization process.

¹⁷ *Supra*, note 9.

¹⁸ R.S.C. 1985, c. C-8.

CHAPTER 2

PENSIONS: BASIC CONCEPTS

1. INTRODUCTION

To help the reader understand the discussions and recommendations found in this report, this chapter describes the different kinds of pension plans, the nature of their regulation, how they are funded, and how they are valued. A glossary of pension terms is found in Appendix A to this report.

A pension plan has been defined as “a plan organized by an employer, a union or a government, primarily to provide a monthly annuity for a participating member after retirement. It will frequently provide additional benefits payable on the premature death, disability or termination of employment of the member”.¹ Although in the past pensions were considered to be “fringe benefits”, they are now usually considered to be an integral part of the employee’s compensation package.²

There are two components to every pension plan: first, the terms and conditions of the plan itself, including the basis on which benefits are paid to members; and second, the financial arrangements that must be made by the plan sponsor to ensure that the plan is able to meet its financial obligations to its members.³ In Ontario, all aspects of creating and administering a provincial pension plan are governed by the *Pension Benefits Act*;⁴ the Pension Commission of Ontario is the administrative body responsible for the regulation of pensions (with the exception of pensions for federally regulated employees).

¹ Jack Patterson, *Pension Division and Valuation[.] Family Lawyers' Guide* (Aurora, Ont.: Canada Law Book, 1991), at 7.

² Lawrence E. Coward, *Mercer Handbook of Canadian Pension and Benefit Plans*, 10th ed. (North York, Ont.: CCH, 1991), at 1 (hereinafter referred to as “*Mercer Handbook*”).

³ *Ibid.*, at 4.

⁴ R.S.O. 1990, c. P.8.

2. TYPES OF PENSIONS

(a) PRIVATE PLANS

Pension plans can be divided into private and public sector plans. Private sector plans include company-sponsored plans, union-sponsored plans, and multi-employer or jointly trusted plans. In the case of company-sponsored plans, pensions are created by a document that describes the terms of the plan as approved by the board of directors. In unionized workplaces, the company pension plan is usually negotiated, and its terms are referenced in a collective agreement.⁵ In some employment sectors, such as the construction and garment industries, multi-employer plans are more common. These plans are administered by a board of trustees consisting of representatives from labour and management or by union-appointed trustees.

Private plans can fall under provincial or federal jurisdiction.⁶ Private plans falling under federal jurisdiction include those in the areas of interprovincial and international transportation and banking, and they are governed by the federal *Pension Benefits Standards Act, 1985*.⁷ This Act applies to Air Canada, the Canadian Broadcasting Corporation, Canadian Airlines, Via Rail, and all banks.⁸ All private provincial plans are regulated by the Ontario *Pension Benefits Act*. The provisions of this Act apply to "every pension plan that is provided for persons employed in Ontario".⁹

(b) PUBLIC PLANS

Public plans provide pensions to public sector employees. They are based on specific pieces of legislation and can fall under federal or provincial jurisdiction.¹⁰ Federal public plans are regulated by the *Pension Benefits Division Act*.¹¹ This statute applies to federal government employees whose pension plans fall under the *Public Service Superannuation Act*,¹² the *Royal Canadian Mounted*

⁵ Patterson, *supra*, note 1, at 9.

⁶ *Ibid.*, at 37-38.

⁷ R.S.C. 1985, c. 32 (2nd Supp.), s. 4(4).

⁸ E. Diane Pask and Cheryl A. Hass, "Division of Pensions: The Impact of Family Law on Pensions and Pension Plan Administrators" (1992), 9 Can. Fam. L.Q. 133, at 155.

⁹ *Supra*, note 4, s. 3.

¹⁰ Patterson, *supra*, note 1, at 7-8.

¹¹ S.C. 1992, c. 46 (Schedule II).

¹² R.S.C. 1985, c. P-36.

Police Superannuation Act,¹³ the *Royal Canadian Mounted Police Pension Continuation Act*,¹⁴ the *Canadian Forces Superannuation Act*,¹⁵ the *Members of Parliament Retiring Allowances Act*,¹⁶ the *Defence Services Pension Continuation Act*,¹⁷ the *Diplomatic Service (Special) Superannuation Act*,¹⁸ the *Governor General's Act*,¹⁹ and the *Special Retirement Arrangements Act*.²⁰

There are also several provincial plans for public service employees.²¹ In Ontario, these include plans established under the *Teachers' Pension Act*,²² the *Ontario Municipal Employees Retirement System Act*,²³ the *Legislative Assembly Retirement Allowances Act*,²⁴ and the *Public Service Pension Act*.²⁵ These plans are subject to the *Pension Benefits Act*.

(c) GOVERNMENT-SPONSORED PLANS

Plans sponsored by the federal government include the Canada Pension Plan (CPP)²⁶ and Old Age Security (OAS)²⁷. The OAS benefits are available to individuals in Canada who have reached the age of sixty-five and who meet the minimum residency requirements. A Guaranteed Income Supplement and Spouse's Pension Allowance are available in prescribed circumstances.²⁸

¹³ R.S.C. 1985, c. R-11.

¹⁴ R.S.C. 1970, c. R-10.

¹⁵ R.S.C. 1985, c. C-17.

¹⁶ R.S.C. 1985, c. M-5.

¹⁷ R.S.C. 1970, c. D-3.

¹⁸ R.S.C. 1985, c. D-2.

¹⁹ R.S.C. 1985, c. G-9.

²⁰ S.C. 1992, c. 46 (Schedule I).

²¹ Patterson, *supra*, note 1, at 8.

²² R.S.O. 1990, c. T.1.

²³ R.S.O. 1990, c. O.29.

²⁴ R.S.O. 1990, c. L.11.

²⁵ R.S.O. 1990, c. P.48.

²⁶ *Canada Pension Plan*, R.S.C. 1985, c. C-8.

²⁷ *Old Age Security Act*, R.S.C. 1985, c. O-9.

²⁸ *Mercer Handbook*, *supra*, note 2, at 3.

3. TERMS AND CONDITIONS

(a) CONTRIBUTORY AND NON-CONTRIBUTORY PLANS

Pension plans may be contributory or non-contributory. "Contributory" plans require employee members to contribute to the cost of the plan; "non-contributory" plans do not. The employer is responsible for the funding of non-contributory plans. The funding of pension plans is subject to pension legislation governing the accumulation and investment of the contributions set aside each year; this legislation ensures that the funds are adequate to meet the obligation of providing benefits to members.

Most pension plans, including all public service pension plans, are contributory and require that some contribution to the plan be made by the participating members. For example, private sector pension plans often require contributions of five percent of salary; public sector plans usually require between six and seven percent.²⁹ Under some plans, members are entitled to make additional voluntary contributions. This has the effect of increasing the pension benefit that the member ultimately receives.³⁰

(b) PENSION FORMULA

An essential feature of any pension plan is the formula that sets out the basis on which the pension benefit is paid. In some pension plans, benefits are based on contributions by the member and the employer; in other plans, they are determined by a prescribed formula.

(i) Defined Benefit Plans

A defined benefit plan is a pension plan that "defines a distinct benefit that the participating member will receive at retirement".³¹ The majority of plan members in Ontario belong to defined benefit plans. These plans may be contributory or non-contributory. Employer contributions in a defined benefit plan vary from year to year. The annual employer contribution represents an amount that is sufficient to fund current and projected future liabilities. The amount of such contributions depends on factors such as investment return on the

²⁹ *Ibid.*, at 33.

³⁰ *Ibid.*, at 33-34.

³¹ Patterson, *supra*, note 1, at 12.

fund, mortality rates of members, and rates of inflation.³² There are three types of defined benefit plans: final earnings plans, career average earnings plans, and flat benefit plans.³³

a. Final Earnings Plans

In final earnings plans (including final average and best average earnings plans), the employee's pension benefit is "based upon his or her length of service and average earnings for a stated period before retirement".³⁴ The typical final earnings pension provides between one and two percent of average earnings in the five years before retirement, multiplied by the number of years of service. The final earnings formula is commonly used in public sector plans and in large private plans. Most contributory final earnings plans integrate their benefits with CPP, and benefits are reduced to reflect the fact that the member will also be receiving CPP.³⁵

b. Career Average Earnings Plans

In career average earnings plans, "the member's pension for each year of service is equal to a percentage of earnings for that particular year".³⁶ Career average earnings plans can be less advantageous for employees unless the plans are "updated" from time to time to produce a result that comes closer to a final average plan. The updating is effected by the employer altering the "base year" in the pension formula, for example, to a more recent year with a higher salary.³⁷

c. Flat Benefit Plans

In flat benefit plans, pension benefits are based on a specified dollar amount per year of service; for example, twenty dollars per month for each year of service. The formula for flat benefit plans does not take into consideration differences in earnings, or inflation. To compensate for this factor, new

³² *Ibid.*

³³ *Ibid.*

³⁴ *Mercer Handbook, supra*, note 2, at 9.

³⁵ *Ibid.*, at 10.

³⁶ *Ibid.*

³⁷ *Ibid.*, at 11.

agreements are negotiated through the collective bargaining process between employers and employees to increase the pension benefit payable.³⁸

(ii) Defined Contribution Plans

In defined contribution plans, also referred to as “money purchase” plans, employees and employers each contribute a specified amount. The contributions are accumulated with interest in an account for the benefit of the employee. The account continues to grow until the employee retires, and the employee is then entitled to a pension that can be purchased, based on the account balance. The amount of the pension is not usually ascertainable until the member retires. Commonly, both employees and employers contribute five percent of income, an amount that may be reduced by contributions required for CPP.³⁹

(iii) Hybrid and Combination Plans

Hybrid plans contain features of defined benefit and defined contribution plans. In hybrid plans, the pension benefit is based, in part, on the accumulation of a defined contribution and, in part, on a defined benefit formula. The pension will be the greater of two types of benefits, for example, “the greater of a defined benefit, of, say 1 3/4 per cent of salary for each year of service, and the pension that can be generated by defined contributions of say 5 per cent from the member matched by the employer”.⁴⁰ Combination plans include characteristics of both defined benefit and defined contribution plans, and pension benefits are the sum of both benefits. The employer usually funds the defined benefit portion of the plan, and the employee contributes to the defined contribution component.⁴¹

³⁸ Patterson, *supra*, note 1, at 14, and *Mercer Handbook*, *supra*, note 2, at 11-13.

³⁹ *Mercer Handbook*, *ibid.*, at 13.

⁴⁰ *Ibid.*, at 16.

⁴¹ *Ibid.*

(c) RETIREMENT COMMENCEMENT DATES

There are three possible retirement commencement dates: normal, early, and late or postponed. Each pension plan, in compliance with the provisions of the *Pension Benefits Act*, sets out the applicable retirement commencement ages.

(i) Normal Retirement Date

Pension plans define the normal retirement age or the age at which members have the right to retire on a full pension. The normal retirement age is usually sixty-five. Provincial legislation provides that the normal retirement age should not be later than one year after the member's sixty-fifth birthday.⁴²

(ii) Early Retirement Date

Plans in Ontario must include provisions permitting a member to retire at any time within the ten years preceding the plan's normal retirement date.⁴³ The early retirement date may be on an unreduced or reduced basis. If the pension is reduced on the early retirement date, it has the same actuarial value as that of the normal pension commencing on the normal retirement date. As a rule, a discount rate of six percent per year is applied between the date of the employee's early retirement commencement date and the normal retirement date.⁴⁴ The value of the pension is thereby affected. For example, if a member retires at the age of sixty, his or her pension, based on an actuarial equivalent of a pension commencing at the age of sixty-five, is about thirty-five percent less than the original amount.⁴⁵

(iii) Postponed Retirement Date

In some cases, the employee may wish to postpone retirement. In some plans, the pension payments commence even if the member continues in employment. In Ontario, members who continue working after the normal retirement date and who are not receiving payments from the plan can continue to accrue benefits in accordance with plan provisions.⁴⁶ Where there are no

⁴² *Pension Benefits Act*, *supra*, note 4, s. 35(1).

⁴³ *Ibid.*, s. 41(1), (2), (5).

⁴⁴ *Canadian Employment Benefits and Pension Guide Reports* (North York, Ont.: CCH, looseleaf), Vol. 1, ¶ 2349, at 2101-02 (hereinafter referred to as "CCH Guide").

⁴⁵ *Mercer Handbook*, *supra*, note 2, at 37.

⁴⁶ *Pension Benefits Act*, *supra*, note 4, s. 35(3).

benefit accruals, the pension available on postponed or late retirement is the "actuarial equivalent of the pension at normal retirement date".⁴⁷

(d) DEATH AND SURVIVOR BENEFITS

(i) Pre-Retirement Benefits

In Ontario when a member dies prior to the commencement of pension payments, there are at least three types of death and survivor benefits. Effective January 1, 1987, in plans where the member is vested and dies before the pension comes into pay, a surviving spouse has the option of an immediate or deferred pension or a cash lump-sum payment.⁴⁸ The value of the death benefit must be equal to the commuted value of the member's post-1986 deferred pension.⁴⁹ With respect to employment prior to January 1, 1987, the beneficiary is entitled to a return of the member's contributions with interest.⁵⁰

If the member has no spouse, or the spouse is living separate and apart from the deceased, or the spouse has signed a waiver, the member may designate a beneficiary to receive the same death benefit. If there is no designated beneficiary, the death benefit is paid to the member's estate.⁵¹ Some pension plans also provide for spouses' pensions and children's pensions where the member dies prior to retirement.⁵²

(ii) Post-Retirement Benefits

In Ontario, when a member dies after retirement, a survivor benefit in the form of a joint-and-survivor pension is available for a surviving spouse who is residing with the member at the date of retirement.⁵³ The joint-and-survivor pension is at least sixty percent of the total pension⁵⁴ and is payable until the death of the surviving spouse. The manner in which a joint-and-survivor pension operates can be illustrated by the following example: a member whose pension at age sixty-five is valued on a single life basis, at \$1,000 per month, opts for a

⁴⁷ *Mercer Handbook*, *supra*, note 2, at 35.

⁴⁸ *Pension Benefits Act*, *supra*, note 4, s. 48(1), (2).

⁴⁹ *Ibid.*, s. 48(1), (2).

⁵⁰ *Ibid.*, s. 36.

⁵¹ *Ibid.*, s. 48(6), (7), (14).

⁵² *Mercer Handbook*, *supra*, note 2, at 41-42.

⁵³ *Pension Benefits Act*, *supra*, note 4, s. 44.

⁵⁴ *Ibid.*, s. 44(3).

joint-and-survivor pension that would pay a lesser benefit of \$800 per month during his life and then pay to his widow \$480 per month until her death.⁵⁵ Some pension plans provide for conversion from a single life or life only policy to a joint-and-survivor annuity on a subsidized basis that is extremely favourable to the employee. The pension in that instance is not actuarially reduced for the joint-and-survivor option, but is reduced by a lesser amount—for example, five percent.⁵⁶

Some pensions provide for post-retirement death benefits in the form of guaranteed terms of five, ten, or fifteen years. These pensions are often payable to the member's estate for the duration of the term should he or she die before the term is up.⁵⁷ Sometimes "the guarantee period is equal to the employee contributions with interest at the date of retirement, divided by the monthly pension benefit".⁵⁸ This option is referred to as a "cash refund annuity". It guarantees a return of the member's contributions with interest, reduced by the benefits received under the pension plan.

(e) WITHDRAWAL OF BENEFITS

(i) Vesting and Locking-in

Before January 1, 1965, there were no vesting rules.⁵⁹ Currently, there are two sets of vesting rules in Ontario, depending on whether the pension benefit accruals occurred before January 1, 1987, or on or after that date. For benefits accruing prior to January 1, 1987, pensions are vested after the employee completes ten years of employment or membership and reaches age forty-five.⁶⁰ For benefits accruing after December 31, 1986, pensions are vested after twenty-four months of membership.⁶¹ Vesting arrangements may be more generous in particular pension plans.⁶²

⁵⁵ *Mercer Handbook*, *supra*, note 2, at 39.

⁵⁶ *Ibid.*, at 40.

⁵⁷ *Ibid.*

⁵⁸ CCH Guide, *supra*, note 44, Vol. 1, ¶ 2357, at 2105.

⁵⁹ *Ibid.*, ¶ 1305, at 1401.

⁶⁰ *Pension Benefits Act*, *supra*, note 4, s. 36.

⁶¹ *Ibid.*, s. 37.

⁶² *Ibid.*, s. 64.

Once a pension is vested, pension contributions are locked in—that is, they cannot be withdrawn or lost on termination of employment.⁶³ On termination, the member is entitled to have the commuted value transferred to a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*, to an insurance company for purchase of an annuity payable on the early retirement date, or to another pension plan if the new plan administrator agrees to such a transfer.⁶⁴ The amount cannot be received in cash. If employment is terminated where the pension is not vested and the plan is contributory, the member has the right only to a return of his or her contributions plus interest.⁶⁵

(ii) Portability

A pension is said to be portable when its commuted value is transferable on termination of employment to another pension vehicle, such as a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*, a locked-in annuity, or a new plan if the new plan administrator agrees to such a transfer.⁶⁶ Once a transfer is effected, the plan has no further obligation to the former member.⁶⁷ The commuted value of the pension is determined as of the termination date. In Ontario, there is no right of portability when the member is eligible to receive an immediate pension unless the plan so provides. This situation arises when the termination occurs within ten years of the plan's normal retirement date.⁶⁸

(iii) Fifty-Percent Rule

The fifty-percent rule applies when a member terminates employment, dies, retires, or winds up a plan. The rule ensures that the plan sponsor in a defined benefit plan provides a minimum level of contributions towards the employee's pension. Under the rule, contributions to a pension by a member made on or after January 1, 1987, and interest on the contributions, cannot be used to provide more than fifty percent of the commuted value of a pension or deferred pension.⁶⁹ In the event of termination of employment, excess contributions by the

⁶³ *Ibid.*, s. 63(1).

⁶⁴ *Ibid.*, s. 42(1), and regulations to the *Pension Benefits Act*, R.R.O. 1990, Reg. 909, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

⁶⁵ *Pension Benefits Act*, *supra*, note 4, s. 63(3), (4).

⁶⁶ *Ibid.*, s. 42(1).

⁶⁷ *Ibid.*, s. 42(11).

⁶⁸ *Ibid.*, s. 41(3).

⁶⁹ *Ibid.*, s. 39(3).

employee, plus interest, are refunded to the employee in a lump-sum payment.⁷⁰ The fifty-percent rule does not apply to non-contributory plans, nor does it apply to defined contribution plans.⁷¹ The excess contributions available under the fifty-percent rule are not locked in on termination.

(f) TERMINATION OF PENSION PLANS

The process for terminating a pension plan is regulated by the *Pension Benefits Act* and the provisions of the plan. The termination or wind-up of the plan may be made voluntarily on written notice by the employer or the plan administrator to the Superintendent of Pensions⁷² or by order of the Superintendent.⁷³ When a plan is wound up, the plan administrator is required to provide members and beneficiaries with a statement outlining their benefit entitlement as well as any options available.⁷⁴ Individuals are required to choose one option; if they fail to do so, they are deemed to have chosen to receive an immediate payment of a pension, if eligible, or a deferred pension payable at the earliest date on which they could receive an unreduced pension under the terms of the plan.⁷⁵

In addition, where an employer sells, assigns, or disposes of his or her entire business or a portion thereof and the successor employer does not assume responsibility for the accrued benefits under the original plan, the members are entitled to the benefits accrued at the date of the sale, assignment, or disposal.⁷⁶

(g) REFUND OF SURPLUS

The issue of a refund of surplus is relevant only to defined benefit plans. In a defined benefit plan, the plan sponsor undertakes to provide pension benefits in the future to members of the plan. To ensure that sufficient funds will be available to meet these future obligations, the *Pension Benefits Act* contains extensive funding rules and regulations. At times, there may be deficiencies in the fund that are corrected, and, at other times, surpluses may occur. In practice,

⁷⁰ *Ibid.*, s. 39(4).

⁷¹ *Ibid.*, s. 39(5).

⁷² *Ibid.*, s. 68(1), (2).

⁷³ *Ibid.*, s. 69(1).

⁷⁴ *Ibid.*, s. 72(1).

⁷⁵ *Ibid.*, s. 72(2).

⁷⁶ *Ibid.*, s. 80(1).

plan sponsors typically use the surplus to improve benefits or to reduce ongoing funding costs.

No payment of surplus may be made on a wind-up or during the operation of a plan without the permission of the Pension Commission of Ontario.⁷⁷ As part of this process, the employer must give notice to all interested persons.⁷⁸ Criteria set out in the Act stipulate when the Commission can permit the withdrawal of any surplus funds for a continuing plan⁷⁹ or on a full or partial wind-up.⁸⁰ A plan that does not specifically provide for withdrawal of surplus by an employer is deemed to require the surplus to be paid proportionately on the plan's wind-up to all members, former members, and other individuals with entitlements under the plan.⁸¹

(h) PROTECTION AGAINST INFLATION

(i) Contractual Indexing

Some pension plans provide for contractual indexing. "Indexing" refers to the degree to which pension benefits are increased in order to keep pace with inflation. Such increases are made in accordance with a formula, typically expressed as a percentage of annual increases in the Consumer Price Index (CPI).⁸² Indexing may occur during either or both of the pre-retirement period and the post-retirement period. In the public sector, most of the larger plans are indexed. In Ontario, no mandatory indexing is prescribed by law.

(ii) *Ad Hoc* Indexing

Most private sector plans do not provide automatic indexing. Contractual indexing can be very expensive and risky. Inflation can rise quickly, resulting in huge increases in funding costs for plan sponsors. As a result, most private plans provide for non-contractual indexing, where adjustments are made to benefit levels to reflect the rate of inflation on an *ad hoc* basis. *Ad hoc* indexing is commonly found in larger defined benefit plans.⁸³

⁷⁷ *Ibid.*, s. 78(1).

⁷⁸ *Ibid.*, s. 78(2).

⁷⁹ *Ibid.*, s. 79(1).

⁸⁰ *Ibid.*, s. 79(3).

⁸¹ *Ibid.*, s. 79(4).

⁸² Patterson, *supra*, note 1, at 15.

⁸³ CCH Guide, *supra*, note 44, Vol. 1, ¶ 2373, at 2109-10.

(i) BRIDGING BENEFITS

Some plans provide an ancillary benefit in the form of a bridging benefit made available to a member who wishes to retire prior to reaching the age at which entitlement to CPP commences. The bridging benefit is a form of a supplement that covers the amount of CPP payable. The member therefore receives a correspondingly higher benefit until CPP payments begin.⁸⁴ Where a pension plan provides for bridging benefits that cease when a member begins to receive his or her retirement benefits under CPP, the reduction must be in accordance with the regulations to the *Pension Benefits Act*.⁸⁵ If the plan does not provide for a specific age at which the bridging benefit is reduced, the age is deemed to be sixty-five.⁸⁶

4. TAXATION

Once they have been registered with the Ministry of National Revenue for income tax purposes, pension plans are a means of deferring taxes for both plan sponsors and plan members. Both groups are entitled to deduct their pension contributions. Earnings of the pension fund are also exempt from tax. In most cases, however, benefits paid to members are subject to tax.⁸⁷ Once registered federally, the plan is also eligible for relief under provincial tax legislation.

5. DISCLOSURE AND REPORTING REQUIREMENTS

Under provincial legislation, plan administrators are required to keep members informed about pension plan matters. They are expected to send certain kinds of information to members or make that information available on request. Information to be given to members includes an explanation of the plan, including member rights and duties, benefit statements, amendments to the plan, and statements on termination and death. Information made available on request includes plan documents, audited financial statements, correspondence with regulatory authorities, and actuarial valuation reports.⁸⁸

⁸⁴ *Mercer Handbook*, *supra*, note 2, at 29.

⁸⁵ *Supra*, note 64, s. 51.

⁸⁶ *Ibid.*, s. 51(2).

⁸⁷ *Mercer Handbook*, *supra*, note 2, at 100-01.

⁸⁸ *Pension Benefits Act*, *supra*, note 4, ss. 25-30, and regulations, *supra*, note 64, ss. 38-46.

6. FUNDING AND UNDERWRITING

(a) FUNDING METHODS

To fund pensions, the plan sponsor must make the proper financial arrangements to ensure that the pension payments can be made when the pension comes into pay. These financial arrangements influence the cost of the plan to the employer. Some public sector pension plans do not have special funds set aside to fund their pension obligations.⁸⁹ These funds are called “pay-as-you-go” plans, where the government employer finances the pension benefits out of current revenue. Such plans are, in fact, not funded at all because no fund is accumulated.⁹⁰

Private plans and most governmental plans are funded in advance. Advance funding requires “the accumulation of invested assets, consisting of employer contributions (and employee contributions, if any) and investment income, sufficient to pay for all retirement, death, disability and termination benefits as they arise”.⁹¹ The *Pension Benefits Act*⁹² requires that plans be funded to a standard of solvency. Actuarial valuations are conducted every three years to determine the amount of contributions needed to ensure that the plan can meet its obligations to members who retire, terminate employment, or die.⁹³

The actuary reviews the assets of the fund and compares these assets to the liabilities or the present and future obligations to provide pensions for members. This investigation determines whether current assets, together with future investment return at an assumed rate, are sufficient to pay for all future pensions and other benefits earned up to the date of valuation. The actuary is then in a position to recommend to the plan sponsor the future funding rate that will fund the benefits under the pension plan.⁹⁴

A funding method must be chosen that apportions the net cost (the present value of future benefits minus the current fund assets) over future years. Funding methods usually produce a “valuation balance sheet”, which shows whether the

⁸⁹ *Mercer Handbook*, *supra*, note 2, at 54.

⁹⁰ *Ibid.*, at 61.

⁹¹ *Ibid.*, at 53.

⁹² *Supra*, note 4, s. 55.

⁹³ Regulations under the *Pension Benefits Act*, *supra*, note 64, ss. 14(1), 15.

⁹⁴ *Mercer Handbook*, *supra*, note 2, at 56-57.

plan is in a surplus or a deficit position, and a "normal cost", which is the amount required to be paid into the plan to fund the future benefits.⁹⁵

(b) ACTUARIAL ASSUMPTIONS

In the valuation process, the actuary must make assumptions about future events. These assumptions are inserted into a variety of formulae that are applied to current membership data. A figure is thereby produced for the present value of future pensions and other benefits to be paid for current members. Demographic assumptions include rates of mortality, retirement, termination of employment, disability, married and family statistics. Economic assumptions include interest rates, salary or wage increases, and inflation rates.⁹⁶

(i) Mortality

The probability of death before retirement and the length of life after retirement are determined by mortality tables based on age and sex. Normally, standard mortality tables are used. It is permissible to use sex-distinct mortality tables, but it is illegal to discriminate on the basis of sex in the commutation of benefits or contributions of members. A great many mortality tables exist and the actuary will employ the mortality table considered appropriate for the particular type of industry and environment in which members are employed. In the case of larger pension plans, tables are constructed based on the actual experience of those groups.⁹⁷

(ii) Retirement

Large pension plans make available to members a number of possible retirement ages. Where there is no subsidized early retirement benefit, that is, where the pension payable on early retirement is the actuarial equivalent of the pension at normal retirement age, then it is assumed that employees will retire at the normal retirement age. Where the early retirement benefit is an unreduced one, the amount of pension is not actuarially reduced for early retirement. In this instance, the assumed retirement age will affect costs in a dramatic way.⁹⁸

⁹⁵ John Corp, *Actuarial Funding Methods* (University of Manitoba, Department of Continuing Education, 1988-90) (material prepared for a course on pension plans and other retirement savings arrangements), at 1.

⁹⁶ *Mercer Handbook*, *supra*, note 2, at 62.

⁹⁷ *Ibid.*, at 63.

⁹⁸ *Ibid.*, at 64.

(iii) Interest Rates

Assumed interest rates represent the investment return expected on the pension fund's assets over a long period in the future. Interest rates include the following three elements:⁹⁹

- (i) a basic real rate of return on risk-free investments, plus
- (ii) the rate of inflation, plus
- (iii) a risk premium, if the fund is invested in anything other than risk-free cash or short-term, federal government bonds.

Because a pension plan is a long-term concern, assumptions of investment return tend to be conservative; they cannot be too conservative, however, since this would impose an unnecessarily high cost on the plan.

(iv) Salary Scales

Salary scales are used to represent the rate of increase of the employees' future earnings. Such an assumption is not needed in a flat benefit plan nor in a career average earnings plan valued on a single-premium basis. However, in plans that base pensions on earnings close to retirement, the rate of salary increase is crucially important. Salary scales are necessary for career average earnings plans valued on a level-premium method and for all final average plans.¹⁰⁰ Salary increases are composed of¹⁰¹

- (i) increases with age and service due to the individual's promotion, seniority and merit, plus
- (ii) increases at the rate of inflation, plus
- (iii) increases attributable to increased productivity of the firm, the industry, and the nation.

These types of salary increases are combined in a valuation that assumes that younger employees will receive larger increases than older employees.

⁹⁹ *Ibid.*, at 65.

¹⁰⁰ *Ibid.*, at 67.

¹⁰¹ *Ibid.*

(v) Family Statistics

Where the pension plan provides benefits for survivors of deceased members, assumptions may be necessary about the percentage of members married at each age, the relative ages of husbands and wives, and the number and ages of children.¹⁰²

(vi) Termination

Another major factor in the valuation process is the rate of termination. Termination of employment usually results in a profit to the plan. If no account is taken of these terminations in advance, a large surplus occurs at the next valuation. The actuary applies termination discounts that represent an estimate of the number of employees who will fail to remain members of the plan until normal retirement age because they voluntarily terminate their employment or are let go. Actuarial studies have resulted in the compilation of termination discounting tables for all types of employee groups, and the actuary will choose the best table for the particular group. In larger pensions, the actuary will determine the actual termination experience among the members of the plan and will construct customized tables.¹⁰³

(vii) Expenses

Estimates must be made of expenses to be charged to the fund, such as charges for administrative, legal, and consulting services.¹⁰⁴

(c) PENSION FUND MANAGEMENT

Pension funds are managed in three ways: by trust companies, by insurance companies, and by the pension plan sponsor itself. Trust and insurance companies hold the assets under a trust or an insurance agreement with the plan sponsor. In most cases, trust and insurance companies manage the pension fund assets on a pooled fund or segregated fund basis. Under the segregated fund approach, the pension assets are held in a separate fund with a trust company under a trust agreement or with an insurance company under a segregated fund contract.¹⁰⁵

¹⁰² *Ibid.*, at 68.

¹⁰³ *Ibid.*, at 64-65.

¹⁰⁴ *Ibid.*, at 68.

¹⁰⁵ CCH Guide, *supra*, note 44, Vol. 1, ¶ 2435, at 2126, and *Mercer Handbook*, *supra*, note 2, at 73.

Most plans do not have large enough assets to justify an independent trust agreement or segregated funds. Rather, they invest in pooled funds offered by insurance and trust companies or in mutual funds that qualify as pension plan investments. Pooled funds allow pension plans to pool their assets in order to obtain a portfolio large enough to invest effectively.¹⁰⁶

While most plan sponsors use insurance companies or trust companies to manage their pension funds, there is no legislative reason why the plan sponsor cannot manage its own fund. However, even where a sponsor undertakes to manage its own fund, it must comply with provincial legislation that requires reports and returns to be completed by an actuary.¹⁰⁷

7. VALUATION OF PENSIONS

Pensions may be valued for a number of purposes, including determining portability rights on termination of employment, value of death benefits, transfer values on marriage breakdown, and valuation for family law purposes. The method of valuation employed will vary depending on whether the plan is a defined benefit plan or a defined contribution plan.

(a) CONTRIBUTIONS METHOD

In the contributions method of valuation, the value of the pension equals the contributions to the plan together with investment yield. The contributions method is used in a number of contexts. For example, in a defined contribution plan, the member may wish to transfer his or her interest in the pension asset out of the plan on termination of employment. Where the pension is vested, the member is entitled on termination to the accumulated value of the pension, including employer and employee contributions plus an interest factor.¹⁰⁸ Where a defined contribution plan is not vested, the amount paid to the member consists only of employee contributions plus interest.¹⁰⁹ Similarly, where a defined contribution plan is valued for family law valuation purposes, the value is equal to total employee and employer contributions plus an interest factor. In essence, the contributions method is similar to valuing a bank account.

The contributions method is used to value a defined benefit plan in one instance under the *Pension Benefits Act*, namely, where the pension has not yet

¹⁰⁶ *Mercer Handbook, ibid.*, at 73-74.

¹⁰⁷ CCH Guide, *supra*, note 44, Vol. 1, ¶ 2405, at 2121-22.

¹⁰⁸ *Pension Benefits Act, supra*, note 4, s. 42(1).

¹⁰⁹ *Ibid.*, s. 63(3).

vested and the member terminates his or her employment or dies.¹¹⁰ In that instance, the amount available to be paid out in a cash lump sum is based on employee contributions plus interest.

(b) ACTUARIAL METHODS

(i) Actuarial Valuation

An actuarial valuation of the plan occurs in a number of circumstances. Under the regulations to the *Pension Benefits Act*,¹¹¹ an actuarial valuation is required every three years. The valuation includes a historical review of the plan and the fund, as well as cost estimates of pensions and other plan benefits accrued to the date of valuation and expected to be earned in the future. The actuarial assumptions previously made are re-examined and, if necessary, adjusted in light of actual experience during the valuation period and under current market conditions. In an actuarial valuation, estimates of true developments affecting the costs of the benefits to be provided under a plan are used. These include estimates of mortality, salary increases, investment return, employee turnover, and retirement ages. The purpose of the actuarial valuation is to assess the solvency of the plan and to determine the level of contributions required to maintain its solvency.¹¹²

(ii) Computation of Capitalized Value of Pensions on Marriage Breakdown

Under the Ontario *Family Law Act*,¹¹³ pension assets must be valued along with the other assets owned by spouses at the time of marriage breakdown. In performing these valuations, actuaries must conform to the current law regarding valuations for family law purposes and to the Canadian Institute of Actuaries' Standard of Practice.¹¹⁴ This standard is applicable only to the valuation of defined benefit plans.

¹¹⁰ *Ibid.*, ss. 48(1), 63(3).

¹¹¹ *Supra*, note 64, ss. 14(1), 15.

¹¹² *Ibid.*, s. 17.

¹¹³ R.S.O. 1990, c. F.3.

¹¹⁴ Canadian Institute of Actuaries, *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments* (September 1, 1993), reproduced *infra*, Appendix B.

The purpose of the Standard of Practice and the assumptions and principles developed in the current law is to provide a "present value" of the future pension benefits accruing to the member spouse. Patterson defines "present value" in the following terms:¹¹⁵

the funds that must be invested at the valuation date so that, after allowing for income in the form of interest on both the original fund and on reinvestment of income, the total funds are just adequate to provide the annual pension benefits, including any indexing, taking into consideration the fact that the recipient of the pension must survive to receive any individual payment.

An actuary, in calculating the present value of a defined benefit plan, determines a sum that, "if set aside on the valuation date, would accumulate sufficient interest as of the retirement date to produce the level of pension accrued during the marriage".¹¹⁶ According to Patterson, the actuary takes into consideration the following factors in determining the present value:¹¹⁷

- (a) the probability that the member, and the member's spouse, if appropriate, will survive to enjoy the pension benefits to which the member is entitled in any particular year in the future;
- (b) such pension benefits may be indexed over the years to fully or partially reflect inflation;
- (c) the taxes that will be deducted from such income; and
- (d) the value of a pension is determined assuming that such value will be invested and that the interest the investment earns will be reinvested.

A number of factors are taken into account in the calculation of present value, such as assumptions relating to mortality, interest rates, inflation rates, and retirement age. Two calculations are used to determine the present value. First, the value of the amount of the pension accrued to the valuation date is determined. The accrued pension is the amount of the pension payable in the form of a monthly annuity commencing on a set retirement date. Secondly, a series of discounts are made that reduce the value of the benefit, based on the member's age, prevailing interest rates, and income tax considerations.

The assumed retirement date has a significant impact on the value of the pension where the plan offers a subsidized early retirement. The retirement date may be the early retirement date, the actual retirement date, or the normal

¹¹⁵ *Supra*, note 1, at 123-24.

¹¹⁶ Dona L. Campbell and Miller Thomson, "Consideration of Retirement Benefits on Marital Breakdown", in *Pensions: Advising Clients in a Changing Environment* (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 1991) (paper presented at program held in Toronto, October 30, 1991), at C-12.

¹¹⁷ *Supra*, note 1, at 123.

retirement date, or a date determined by a court as being the likely retirement date. Where a plan offers a subsidized early retirement, the early retirement date greatly increases the present value if it is taken into consideration. However, if the pension provided on early retirement is reduced actuarially, the present value is not affected by the early retirement provision.¹¹⁸

Once the present value of the pension is determined for each individual year, an inflation factor is applied to determine the inflated value of the pension in each future year, and then mortality tables are used to determine the number of years during which the member can expect to receive the pension. An interest factor is applied to the pension in each future year to determine the discounted present value at the valuation date. Finally, the values for each individual year are totalled to provide the required present value. Typically, the final value is discounted for future taxes. The manner in which this discount is to occur is the subject of considerable debate in Ontario.¹¹⁹

Under the provisions of the *Family Law Act*,¹²⁰ the actuary must reduce the value of the pension to reflect any pre-marriage accruals. This may be accomplished by doing two valuations—one as of the date of marriage and the other as of the date of valuation. In other cases, a pro-rating of the years of membership in the plan and the years of marriage is done to determine this value.¹²¹

The determination of present value can be made in two ways that have dramatically different impacts on the final value placed on the pension asset. The calculation can assume that the member will continue in employment with the plan sponsor until retirement or that the member will terminate employment at the date of the valuation. If it is assumed that the member will continue in employment until the retirement date, the actuary must take into consideration future increases in the value of the pension benefit due to the employee having attained a higher salary and increasing his or her years of service. This method of determining the present value is referred to as the retirement method. The retirement method assumes that the member's employment does not terminate on the valuation date. Rather, valuation is based on the member's projected salary, benefits, and service at the retirement date or at a date between the valuation and

¹¹⁸ *Ibid.*, at 80.

¹¹⁹ *Ibid.*, at 301-02.

¹²⁰ *Supra*, note 113.

¹²¹ Patterson, *supra*, note 1, at 159-60.

the normal retirement date.¹²² The retirement method produces a higher value than the termination method,¹²³ particularly in the case of final average earnings plans where the member has many years of service and is close to retirement.¹²⁴

If the assumption is made that the employee terminated employment on the valuation date, increases in the value of the pension benefit after the date of separation are not considered. This is referred to as the termination method. Using the termination method, the present value of the benefit is determined at the valuation date as if the plan member terminated employment on that date.¹²⁵ Under the termination method, future contingencies such as salary increases and the likelihood of the member remaining in employment until retirement age are not taken into account.¹²⁶

(c) COMMUTED VALUE FOR TRANSFER PURPOSES

The commuted value is the value of a defined benefit pension plan available for transfer on termination of employment to another locked-in pension vehicle, such as a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*.¹²⁷ The calculations for the commuted value are set out in the regulations to the *Pension Benefits Act*,¹²⁸ in the *Income Tax Act*,¹²⁹ and in the rules of the Canadian Institute of Actuaries.¹³⁰ The commuted value is not generally used for family law purposes. Where a defined benefit pension has not vested, the member on termination of employment is only entitled to a return of employee contributions plus interest. Where the pension has vested, the value available to transfer to another locked-in pension vehicle is the commuted value.

¹²² Sheryl Smolkin and Janet Downing, *Family Law: Voodoo Economics for Women[:]* *Pension Credit-Splitting Pitfalls* (January 29, 1993) (paper prepared for 1993 Institute of Continuing Legal Education, Canadian Bar Association — Ontario), at 13.

¹²³ Campbell and Thomson, *supra*, note 116, at C-17.

¹²⁴ Smolkin and Downing, *supra*, note 122, at 13.

¹²⁵ Campbell and Thomson, *supra*, note 116, at C-16.

¹²⁶ Smolkin and Downing, *supra*, note 122, at 11.

¹²⁷ *Ibid.*, at 11-12, and *Pension Benefits Act*, *supra*, note 4, s. 42(1)(b).

¹²⁸ *Supra*, note 64, s. 19.

¹²⁹ R.S.C. 1952, c. 148, as subsequently re-en. by S.C. 1970-71-72, c. 63.

¹³⁰ Canadian Institute of Actuaries, *Recommendations for the Computation of Transfer Values from Registered Pension Plans* (September 1, 1993), reproduced *infra*, Appendix C.

CHAPTER 3

CURRENT LAW: PENSIONS AND THE *FAMILY LAW ACT*

1. INTRODUCTION

In Ontario before 1986, the division of property on marriage breakdown was governed by the *Family Law Reform Act*.¹ This legislation provided for the equal division of “family assets” that had been accumulated over the course of the marriage. The family assets were defined by the legislation to include the matrimonial home and all other assets ordinarily used by both spouses or the children. Business assets were normally excluded from this calculation and were not generally divided on marriage breakdown.² Similarly, pension assets or funds in a registered retirement savings plan (RRSP) were not considered to be family assets and were not subject to division on marriage breakdown.³

Although reforms were recommended as early as 1980,⁴ it was not until 1986 that legislative reform occurred in the form of the *Family Law Act, 1986*.⁵ Discarding the notion of family assets, this Act adopted the principle that marriage is an economic partnership that requires all assets acquired over the course of the marriage, including all business assets and pension vehicles, to be

¹ R.S.O. 1980, c. 152,, rep. by S.O. 1986, c. 4, s. 71(1).

² The courts enjoyed some discretion to divide non-family assets where the claimant had made a contribution to the acquisition of the asset.

³ *Leatherdale v. Leatherdale*, [1982] 2 S.C.R. 743, 30 R.F.L. (2d) 225. See, also, *St. Germain v. St. Germain* (1980), 14 R.F.L. (2d) 186 (Ont. C.A.). The existence of a pension could still be taken into consideration when calculating how much support a spouse had to pay or when determining how to divide non-family assets: see *Family Law Reform Act*, *supra*, note 1, s. 18(5)(a), and *Laflamme v. Laflamme* (1984), 40 R.F.L. (2d) 366 (Ont. H.C.J.), respectively.

⁴ The *Report of the Royal Commission on the Status of Pensions in Ontario* (Toronto: Queen's Printer, 1980), Vol. III, at 135, recommended that pensions be available, if and when they became payable, for satisfaction of orders for support. The Ontario Ministry of Treasury and Economics, in *Ontario Proposals for Pension Reform[:] Adapting to Social and Economic Transformation* (Toronto: Queen's Printer, April 1984), at 63, recommended a credit-splitting scheme.

⁵ S.O. 1986, c. 4.

divided equally between the spouses on marriage breakdown.⁶ In particular, the legislation expressly defined “property” to include pensions.⁷

2. EQUALIZATION PROCESS UNDER *FAMILY LAW ACT*

(a) GENERAL PROCESS

The *Family Law Act*⁸ provides a precise scheme for the division of property on marriage breakdown. The value of all assets held by each spouse, including any interest in a pension, is calculated. Various assets, such as inheritances from a third party after the date of the marriage, are then deducted, as well as the value of any property brought into the marriage and any debts owed on marriage breakdown. The resulting figure represents the “net family property”⁹—that is, the net value of all the assets—accumulated by each spouse over the course of the marriage.

⁶ In order to determine the net value of family property, all such property must be valued. Once valued, the spouse with the greater value is required to equalize the situation by transferring one-half of the difference between that value and the value of the other spouse’s assets to the other spouse: *ibid.*, s. 5.

⁷ *Family Law Act*, 1986, *ibid.*, s. 4(1). “Property” is now defined in s. 4(1) of the *Family Law Act*, *infra*, note 8, as follows:

‘property’ means any interest, present or future, vested or contingent, in real or personal property and includes,

....

- (c) in the case of a spouse’s rights under a pension plan that have vested, the spouse’s interest in the plan including contributions made by other persons.

This provision is consistent with an earlier recommendation of the Ontario Law Reform Commission: see *Report on Family Law[:]* Part IV: *Family Property Law* (Toronto: Ministry of Attorney General, 1974), at 101.

⁸ R.S.O. 1990, c. F.3.

⁹ The *Family Law Act*, *ibid.*, s. 4(1) defines “net family property” as follows:

‘net family property’ means the value of all the property, except property described in subsection (2) [various excluded property, such as inheritances after the date of the marriage], that a spouse owns on the valuation date, after deducting,

- (a) the spouse’s debts and other liabilities, and
- (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage.

The spouse with the lower asset value is entitled to apply for an "equalization payment" representing one-half of the difference between the two figures.¹⁰ The objective is that each spouse will then have an equal share of the total assets accumulated over the course of the marriage. The Act does not confer any right to or any interest in any specific property; it merely entitles the spouse with the lesser net family property to make a claim for an equalization payment.

Only spouses—parties who are legally married—may bring an application for an equalization payment on marriage breakdown.¹¹ Unmarried cohabitants are not entitled to bring such an application; the *Family Law Act* makes no provision for the division of any property acquired by unmarried cohabitants over the course of their cohabitation.¹²

The Act requires that all property (including any pension) held on the date of marriage breakdown, as well as any property brought into the marriage, be valued in order to calculate the net family property of each spouse. The Act is silent, however, as to the manner in which property is to be valued. A spouse who claims a deduction or exemption from net family property bears the onus of proof,¹³ and a spouse's net family property cannot be reduced below zero.¹⁴

(b) Settling Equalization Payments

The *Family Law Act* provides a number of methods by which the equalization obligation may be settled.¹⁵ Typically, an equalization payment is satisfied through a payment of a lump-sum amount, through a series of payments,

¹⁰ The *Family Law Act*, *ibid.*, s. 7 enables a spouse to apply to the court to determine any matter respecting that spouse's entitlement under s. 5(1), which provides as follows:

5.—(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

Section 5(6) permits the court to award an amount that is more or less than one-half of the difference between the net family properties of the spouses where an equal division would be unconscionable having regard to the circumstances set out in s. 5(6)(a)-(h).

¹¹ *Ibid.*, s. 7.

¹² An unmarried cohabitant may, however, have a common-law remedy in constructive trust or resulting trust.

¹³ *Family Law Act*, *supra*, note 8, s. 4(3).

¹⁴ *Ibid.*, s. 4(5).

¹⁵ *Ibid.*, s. 9.

or through the transfer of assets. If unable to agree on a settlement of the family property, a spouse may apply to court to determine any matter respecting the spouses' entitlement to equalization of their net family property.¹⁶ The court may order one spouse to pay the other the amount to which the court finds the other is entitled. Where the payment of a lump sum would create hardship, the court has the option of ordering that the equalization payment be paid in instalments over a period not exceeding ten years, or that all or part of the amount of the payment be delayed for a period not exceeding ten years.¹⁷ The court can also order a transfer of property to satisfy the equalization payment.¹⁸ While the court is not able to order a division of property directly, it can order property to be transferred to a spouse, held in trust for a spouse, or vested in a spouse, whether absolutely, for life, or for a term of years.¹⁹

3. "IF AND WHEN" ARRANGEMENTS

(a) WHEN COURTS WILL MAKE "IF AND WHEN" ORDERS

Although the courts express a strong preference for a lump-sum settlement at the time of marriage breakdown,²⁰ such a settlement may be difficult for the member spouse where one of the assets is a large pension. For that reason, the courts have devised an "if and when" arrangement to permit the member spouse to satisfy any equalization claim with respect to a pension by undertaking to pay a share of the pension income to the non-member spouse "if and when" the pension becomes payable.

An "if and when" trust arrangement can be created by means of a domestic contract between the parties or by a court order.²¹ The availability of "if and when" arrangements to settle pension property under the *Family Law Act* was first established in Ontario in *Marsham v. Marsham*.²² An "if and when" order typically will not be made by the courts if the parties are young, the value of the pension is small, the equalization payment can be satisfied through available

¹⁶ *Ibid.*, s. 7.

¹⁷ *Ibid.*, s. 9(1)(c).

¹⁸ *Ibid.*, s. 9(1)(d)(i).

¹⁹ *Ibid.*, s. 9(1)(d).

²⁰ See *Best v. Best* (1992), 9 O.R. (3d) 277, 41 R.F.L. (3d) 383 (C.A.) (subsequent references are to 9 O.R. (3d)).

²¹ *Family Law Act*, *supra*, note 8, ss. 7, 54.

²² *Marsham v. Marsham* (1987), 59 O.R. (2d) 609, 7 R.F.L. (3d) 1 (H.C.J.) (subsequent references are to 59 O.R. (2d)).

liquid assets, or the portion of the equalization payment relating to the pension benefits is relatively small.²³

The courts are usually willing to make an “if and when” order where one or more of the following factors are present:²⁴

1. the parties are in their forties or older;
2. there may be long-term spousal support or child support obligations that will prevent the spouses from being economically independent in any event;
3. the pension benefits are a major asset;
4. the matrimonial home is not going to be sold in the foreseeable future;
5. there is minimal equity in the family home and no other easily liquidated assets;
6. there are no assets other than the pension; or
7. the transfer of the matrimonial home to one party would leave the other with no other significant assets other than the pension.

The Court of Appeal in *Best v. Best*²⁵ sets out in greater detail the circumstances under which an “if and when” approach will be appropriate in Ontario. In this case, because the pension would likely not have become payable for another twenty years and the non-member spouse had a pressing need for funds, the Court held that an “if and when” arrangement would not be appropriate. The Court established a general rule that an “if and when” arrangement should not be ordered if the pension benefit will not be realized for ten or more years.²⁶

²³ Catherine D. Aitken, “Pensions Under Part I of the Family Law Act of Ontario”, in Special Lectures of the Law Society of Upper Canada, 1993, *Family Law[:] Roles, Fairness and Equality* (Toronto: Carswell, 1994), at 231.

²⁴ *Ibid.*

²⁵ *Supra*, note 20.

²⁶ The Court stated (*ibid.*, at 282):

A critical factor as to whether to order postponement of the equalization payment representing the pension benefit is the respective ages of the parties and the date when the payment of the pension is to begin. Where the spouses are near retirement, sharing of the pension benefit can be delayed because the waiting period is relatively short. The terms of postponement should contain protection for the payee spouse’s interests.

(b) PENSION VALUATION AND "IF AND WHEN" ARRANGEMENTS

Because of the difficulties associated with valuing pensions, a number of early decisions avoided the problem simply by isolating the pension for separate treatment.²⁷ The pension was excluded from the calculation of net family property and divided separately "if and when" it was received. In *Porter v. Porter*,²⁸ for example, Kerr Dist. Ct. J. held that it was not possible for him to determine the value of the husband's pension as of the valuation date because no actuarial evidence was presented at trial. Instead, he took what was characterized as an "if and when" approach to valuation and divided the pension outside of the equalization process. Similarly, in *Wettlaufer v. Wettlaufer*,²⁹ Costello Dist. Ct. J. avoided the necessity of valuing the pension by separating it from the other property. He found it "impossible to actuarially say or forecast what money is or will be available for pension now or on a given day in the future"³⁰ and, accordingly, ordered that the pension be dealt with on an "if and when" basis.

The approach of excluding pensions from the *Family Law Act* equalization process, however, has been rejected. In *Marsham v. Marsham*,³¹ Walsh J. stated as follows:

If payment of the amount representing the spouse's share of a pension benefit is to be postponed, under s. 9(1)(c) of the Act, it should be for a period which is no longer than ten years. I recognize that s. 9(1)(d) of the Act does provide that, if appropriate, to satisfy an obligation imposed, property may be transferred to, or in trust, for a spouse. In the case of a pension benefit, this may be difficult having regard to the legal questions as to the nature of the ownership and control of a pension benefit, the general non-exigibility of pension benefits, and the need for cumbersome mechanisms to impose a transfer or a trust on a pension benefit.

Where retirement is considerably beyond the period for which an equalization payment may be postponed under the *Family Law Act*, a lump sum is generally appropriate because it enables both spouses to pursue their independent lives and to make plans with more certainty.

A further consideration is the hardship to the payor spouse of making an immediate payment, which should be balanced against the hardship to the payee spouse in not receiving immediate payment.

²⁷ Alastair Bissett-Johnson and Winifred H. Holland (eds.), *Matrimonial Property Law in Canada* (Toronto: Carswell, looseleaf), at O-23.

²⁸ (1986), 1 R.F.L. (3d) 12, at 26 (Ont. Dist. Ct.).

²⁹ (1988), 12 R.F.L. (3d) 379 (Ont. Dist. Ct.).

³⁰ *Ibid.*, at 383.

³¹ *Supra*, note 22, at 614. See, also, *Alger v. Alger* (1989), 21 R.F.L. (3d) 211, at 219 (Ont. H.C.J.).

While it may be permissible to use the 'if and when' approach as a method to both value and to settle the pension entitlement in other provinces, it clearly is not possible within the framework of the Ontario Act.

Part I of the Act requires that all property owned by a spouse on the valuation date be valued in order to determine his or her net family property so that the amount required to equalize the spouses' net family properties can be ascertained. While it may be possible to satisfy all or part of the equalization payment by an immediate transfer of the pension benefits in trust to the other spouse, nevertheless, in the first instance, the pension benefit must be valued for the purpose of determining the equalization payment.

In *Marsham*, the wife was entitled to an equalization payment of \$80,000. While Walsh J. could have ordered that the husband make an immediate lump-sum payment, he held that it would be inappropriate to do so in the circumstances. Of the husband's net family property of \$232,600, \$107,400 consisted of his pension and severance pay, neither of which was available for an immediate payment. As a result, Walsh J. concluded that the portion of the equalization payment attributable to the husband's pension benefits (\$48,500) should be satisfied by "directing that the husband holds his ... pension plan in trust for the wife to the extent that she is entitled to a share or interest therein".³² As a trustee, the husband was prohibited from dealing with the pension asset in a manner that would affect the wife's interest. Walsh J. adopted the pro-rated approach³³ approved by the British Columbia Court of Appeal in *Rutherford v. Rutherford*³⁴ and ordered as follows:³⁵

[T]he wife shall share in the husband's pension in the following proportion: one-half times the number of months of married cohabitation during which pension contributions were made, divided by the total number of months during which contributions were or will be made, times the pension benefits payable.

In addition to the approach adopted in *Marsham*, the courts have also ordered that a specific dollar amount will be payable on a periodic basis commencing on the normal retirement date. In this case, the pension is valued, and the monthly pension income available on retirement is determined. In *Kroone*

³² *Marsham v. Marsham*, *supra*, note 22, at 624. The remaining \$31,500 was ordered to be satisfied out of the proceeds of sale of the matrimonial home, which was directed to be listed for sale no later than June 30, 1990.

³³ The pro-rated approach is only one of several formulae to effect a division by the "if and when" approach. See Jack Patterson, *Pension Division and Valuation[:]* *Family Lawyers' Guide* (Aurora, Ont.: Canada Law Book, 1991), at 221-28.

³⁴ (1981), 30 B.C.L.R. 145 (C.A.).

³⁵ *Marsham v. Marsham*, *supra*, note 22, at 624.

v. Kroone,³⁶ for example, it was determined that the monthly pension income due under a defined benefit pension plan was \$858.65 per month, payable at the age of sixty-five. The Court ordered an “if and when” agreement to satisfy the equalization payment under the *Family Law Act, 1986*,³⁷ in the following terms:³⁸

I believe that the plaintiff should be awarded her 50 per cent share of the accrued pension benefits on an ‘if and when’ basis in the monthly amount of \$429.33 at the defendant’s retirement.

The practice of using “if and when” arrangements to satisfy equalization payments has been less than satisfactory. The realization of the pension benefit occurs over the post-retirement life of the member, and the amount of the benefit paid depends on the life span of the member. As a result, an interest in the pension benefit to which a non-member spouse is entitled may never be realized if the member spouse dies prior to or soon after retirement. On the other hand, where the life span of the member spouse exceeds expectations, or the value of the pension benefit increases after separation, an overpayment to the non-member spouse may result.

4. “IF AND WHEN” ARRANGEMENTS INVOLVING PLAN ADMINISTRATOR

(a) INTRODUCTION

Spousal “if and when” arrangements, such as the one used in *Marsham v. Marsham*,³⁹ impose a trust obligation on the member spouse to comply with the order if and when the pension becomes payable. The administration of the trust is personal to the member. If the member leaves the jurisdiction or for some reason refuses to pay, the non-member spouse may find it difficult or impossible to enforce the terms of the trust.

To address this problem, amendments were made to the *Pension Benefits Act*⁴⁰ in 1988. It became possible to impose a trust on the administrator of the

³⁶ (1992), 41 R.F.L. (3d) 111 (Ont. Gen. Div.).

³⁷ *Supra*, note 5.

³⁸ *Kroone v. Kroone*, *supra*, note 36, at 115.

³⁹ *Supra*, note 22.

⁴⁰ R.S.O. 1980, c. 373, rep. and replaced by the *Pension Benefits Act, 1987*, S.O. 1987, c. 35. See, now, the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (subsequent references are to the 1990 Act).

pension plan itself, in favour of the non-member spouse, requiring the plan administrator to pay a portion of the member spouse's pension directly to the non-member spouse after the commencement of the pension payments.⁴¹

Although the *Pension Benefits Act* generally prohibits the assignment of money payable under a pension plan,⁴² section 51 gives the non-member spouse the right to a share of the periodic payments paid to the member on the member's retirement as long as the non-member spouse is entitled to an interest in the member's pension benefit under a domestic contract or an order under the property provisions of the *Family Law Act*.⁴³ Section 51 contemplates that one spouse may assign a "pension benefit" (that is, the monthly, annual, or periodic

⁴¹ The "if and when" option under the *Pension Benefits Act*, *ibid.*, is set out in s. 51:

51.—(1) A domestic contract as defined in Part IV of the *Family Law Act*, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,

- (a) the date on which payment of the pension benefit commences; or
- (b) the normal retirement date of the relevant member or former member.

(2) A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses.

(3) If payment of a pension or a deferred pension is divided between spouses by a domestic contract or an order mentioned in subsection (1), the administrator is discharged on making payment in accordance with the domestic contract or order.

(4) If a domestic contract or an order mentioned in subsection (1) affects a pension, the administrator of the pension plan shall revalue the pension in the prescribed manner.

(5) A spouse on whose behalf a certified copy of a domestic contract or order mentioned in subsection (1) is given to the administrator of a pension plan has the same entitlement, on termination of employment by the member or former member, to any option available in respect of the spouse's interest in the pension benefits as the member or former member named in the domestic contract or order has in respect of his or her pension benefits.

The *Family Law Act*, *supra*, note 8, s. 51, applies to domestic contracts or orders, including cohabitation agreements between unmarried cohabitants. Cohabitation agreements may define the division of property on termination of cohabitation. Therefore, a domestic contract governing pension rights between unmarried cohabitants may be enforced under s. 51 of the *Pension Benefits Act*.

⁴² *Pension Benefits Act*, *supra*, note 40, s. 65.

⁴³ *Supra*, note 8, Part I (Family Property) and Part IV (Domestic Contracts).

payments made under a pension)⁴⁴ to a non-member spouse by a domestic contract or may be ordered to do so by the court under Part I of the *Family Law Act*.

As a result of section 51, an “if and when” order can now be made under which the paying spouse is no longer a trustee of his or her pension entitlements for the non-member spouse. Instead, a portion of the member spouse’s periodic pension payment is paid directly by the plan administrator to the non-member spouse on retirement.

Exceptions are made to the general prohibition against the assignment of a pension interest found in section 65 of the *Pension Benefits Act* for these purposes. Exceptions permit payment to be made to the non-member spouse if the member spouse terminates employment or dies or if the plan is terminated, where an order or domestic contract under the *Family Law Act* has been filed.⁴⁵

The *Pension Benefits Act* permits the assignment of money payable under a pension plan, pursuant to the terms of a court order under the *Family Law Act* or a domestic contract, but only in circumstances where the money would otherwise be transferred out of the plan, namely: (1) on the date on which payment of the pension benefit commences; (2) on termination of employment; (3) to purchase a pension, deferred pension, or ancillary benefit from an insurance company on retirement;⁴⁶ (4) to provide a pre-retirement death benefit for the member’s spouse, where the member dies before commencement of the pension benefits; or (5) on the wind-up of the plan.⁴⁷

⁴⁴ *Pension Benefits Act*, *supra*, note 40, s. 1 “pension benefit”.

⁴⁵ The *Pension Benefits Act*, *ibid.*, s. 65(3) provides:

65.—(3) Subsections (1) and (2) do not apply to prevent the assignment of an interest in money payable under a pension plan or money payable as a result of a purchase or transfer under section 42, 43, clause 48(1)(b) or subsection 73(2) (transfer rights on wind up) by an order under the *Family Law Act* or by a domestic contract as defined in Part IV of that Act.

⁴⁶ The contract or order could provide for an assignment of moneys payable at retirement.

⁴⁷ Dona L. Campbell and Miller Thomson, “Consideration of Retirement Benefits on Marital Breakdown”, in *Pensions: Advising Clients in a Changing Environment* (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 1991) (paper presented at program held in Toronto, October 30, 1991), at C-38 to C-39.

**(b) OBLIGATIONS IMPOSED ON PLAN ADMINISTRATOR IN EVENT OF
TERMINATION OF EMPLOYMENT BY MEMBER SPOUSE**

Various provisions in the *Pension Benefits Act*⁴⁸ and regulations⁴⁹ have been devised to provide some measure of security to the non-member spouse where there is a plan-administered “if and when” arrangement in place, and where the member spouse terminates employment. Section 51(5) of the Act provides that where a certified copy of a domestic contract or order under the *Family Law Act* is filed with the plan administrator, the non-member spouse has the same entitlements as the member on termination of employment. The options available to the member and the non-member on termination are as follows:⁵⁰

- (1) the right to transfer to another pension if the second plan agrees;
- (2) the right to transfer the amount into a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*;⁵¹
- (3) the right to use the funds to purchase a life annuity that will not commence before the early retirement date; and
- (4) the right to elect a deferred pension in the same plan.

Section 46 of the regulations requires the plan administrator to notify the non-member spouse⁵² of any termination of employment by the member, to provide the non-member spouse with a copy of the termination statement given to the member, and to advise the non-member of the options for transfer under section 42 of the *Pension Benefits Act*. The administrator must do this within thirty days of receiving notice of the member’s termination of employment.

Section 20 of the regulations requires the non-member spouse to deliver a direction to the plan administrator within sixty days of receipt of the notice of termination of employment of the member. The direction must specify to the administrator the option being exercised by the non-member spouse. The plan

⁴⁸ *Supra*, note 40.

⁴⁹ R.R.O. 1990, Reg. 909.

⁵⁰ *Pension Benefits Act*, *supra*, note 40, ss. 37, 42.

⁵¹ See *Pension Benefits Act*, *ibid.*, s. 42(1)(b), and regulations, *supra*, note 49, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

⁵² The definition of “spouse” in s. 51(5) of the *Pension Benefits Act*, *supra*, note 40, does not appear to include a former spouse. This creates a problem, since in many cases the parties will be divorced by the time s. 46 of the regulations, *supra* 49, becomes applicable.

administrator must then comply with the option selected within sixty days of receipt of the information from the non-member spouse.

**(c) OBLIGATIONS IMPOSED ON PLAN ADMINISTRATOR IN EVENT OF
MEMBER SPOUSE'S DEATH PRIOR TO RETIREMENT**

Section 48(13) of the *Pension Benefits Act* provides for an assignment of a pre-retirement death benefit in a court order or in a domestic contract under the *Family Law Act*. This subsection appears to carry into effect a specified assignment under section 65(3). It provides that:

48.—(13) An entitlement to a benefit under this section is subject to any right to or interest in the benefit set out in a domestic contract or an order referred to in section 51 (payment on marriage breakdown).

However, the ability of a member spouse to assign a portion of a pre-retirement death benefit where there is a surviving spouse is not clear. Although there is limited case law on this subsection, it is arguable that, where a domestic contract or a court order provides that any pre-retirement death benefit is payable to a non-member spouse, the non-member spouse is entitled to a portion of the pre-retirement death benefit even if a subsequent spouse might otherwise qualify for it by virtue of being a spouse of the member and living with the member at the time of the member's death.

One case that examines this issue is *Suchostawsky v. Metropolitan Life Insurance Company*.⁵³ In that case, as a part of the divorce judgment, the Court ordered that "[s]hould the husband die before or after the retirement, any death benefits payable in lieu of such pension shall be paid to the wife".⁵⁴ The husband was ordered not to make any elections or designations under the plan that would in any way affect the wife's share of the pension without first obtaining the wife's approval.⁵⁵ In violation of the court order, the husband did not designate his wife a beneficiary of the death benefits. On the husband's death, he was living with a common-law wife, who under the *Pension Benefits Act* was entitled to the death benefit. After referring to section 48(13), the Court held that the common-law wife's entitlement to the death benefit was subject to the divorce judgment and the former wife's interest in the death benefit.⁵⁶

⁵³ Unreported (June 30, 1993, Ont. Gen. Div.).

⁵⁴ *Ibid.*, at 3.

⁵⁵ *Ibid.*, at 3-4.

⁵⁶ *Ibid.*, at 10-11.

**(d) INFORMATION TO BE PROVIDED BY PLAN ADMINISTRATOR TO
NON-MEMBER SPOUSE**

The *Pension Benefits Act* requires that the plan administrator provide information or notice directly to the non-member spouse only where there is an "if and when" arrangement filed with the plan and the member terminates employment. However, there are other provisions in the *Pension Benefits Act* under which a non-member spouse could obtain information regarding the member spouse's plan. For example, the Act requires that plan administrators, on written request, make available prescribed documents and information with respect to the plan and the plan fund to a number of individuals including "the spouse of a member or former member" without charge.⁵⁷ These individuals are also entitled to inspect, at the offices of the Pension Commission of Ontario during business hours, the documents that comprise the plan and the plan fund, as well as other prescribed documents, and are entitled to copies on payment of a fee.⁵⁸ Access to these documents provides the non-member spouse with the terms of the plan in detail. However, there is no provision of the *Pension Benefits Act* under which the non-member spouse is entitled to have access to information regarding the member's specific entitlement. If the non-member spouse wishes to have that information, he or she must obtain the consent of the member.

**5. PROBLEMS WITH PLAN-ADMINISTERED "IF AND WHEN"
ARRANGEMENTS**

There are a number of deficiencies in the current regime under the *Pension Benefits Act* with respect to plan-administered "if and when" arrangements. These include timing problems, the likelihood that many "if and when" arrangements may violate the provisions of the Act that prohibit the assignment of more than fifty percent of the member spouse's pension benefits, and the definition of "spouse" in the *Pension Benefits Act*, which overlooks the inclusion of former spouses.

(a) TIMING

Two issues arise with regard to the timing of "if and when" arrangements under section 51 of the *Pension Benefits Act*. The first concerns "if and when" domestic contracts that were created prior to the current provisions coming into force in January 1988. It is possible that some "if and when" arrangements that placed the plan administrator in a trust position were attempted by agreement,

⁵⁷ *Pension Benefits Act*, *supra*, note 40, s. 29(1).

⁵⁸ *Ibid*, s. 30.

and possibly by order, before January 1988. In other words, the spouses may have attempted, in anticipation of the current legislation, to create an "if and when" arrangement that bound the plan administrator prior to the legislation coming into force. In all such cases, even though the division is to take place at a later date (that is, when "if and when" divisions are permitted), the domestic contract or the order effecting these divisions may be invalid because it was created prior to section 51 of the *Pension Benefits Act* being enacted.

The second problem is whether section 51(1) of the *Pension Benefits Act* prevents the creation of a trust prior to the date the member actually receives a pension.⁵⁹ The Act allows pension benefits to be divided between separating spouses, but only when money becomes payable to plan members.⁶⁰ The literal interpretation of the wording of section 51(1) might result in the invalidity of most "if and when" agreements created prior to the pension coming into pay.

(b) VIOLATIONS OF FIFTY-PERCENT RULE

A potential difficulty with the "if and when" approach arises out of section 51(2) of the *Pension Benefits Act*, which limits the amount of the entitlement that may be assigned under a domestic contract or an order under the family property provisions of the *Family Law Act* to no more than fifty percent of the member spouse's pension benefits accrued during the marriage, calculated in the prescribed manner. Section 56 of the regulations to the *Pension Benefits Act*,⁶¹ while not clearly prescribing the exact method of calculation, sets out the basis for that calculation:

56. For purposes of subsection 51(2) of the Act, the pension benefits accrued during the period a member had a spouse shall be determined as if the member terminated employment at the valuation date in accordance with the terms of the plan at that date and without consideration of future benefits, salary or changes to the plan but with consideration for the possibility of future vesting.

⁵⁹ The *Pension Benefits Act*, *ibid*, s. 51(1) provides as follows:

51.—(1) A domestic contract as defined in Part IV of the *Family Law Act*, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,

- (a) the date on which payment of the pension benefit commences; or
- (b) the normal retirement date of the relevant member or former member.

⁶⁰ Patterson, *supra*, note 33, at 222.

⁶¹ *Supra*, note 49.

Substantial difficulties have arisen due to the absence of a prescribed method of pension valuation for ascertaining whether the fifty-percent rule has been violated. It has resulted in lawyers being unable to draft orders and domestic contracts that comply with the rule. As a result, plan administrators, who are statutorily bound not to enforce an order which violates the rule, are faced with the uncertain task of determining whether the rule is violated and the unpleasant duty of refusing to enforce those orders that unavoidably violate it.

It should be noted that failure to comply with section 51(2) does not render the domestic contract or order wholly ineffective. Rather, it renders it ineffective only to the extent that it reduces the pension benefit of the employee to less than fifty percent of its total value.⁶² The practice tends to be that when a plan administrator receives a certified domestic contract or order, it calculates the maximum that can be paid out under an "if and when" arrangement in accordance with section 51 of the *Pension Benefits Act* and section 56 of the regulations. The parties are informed of this amount and are then responsible for allocating the portion exceeding fifty percent by way of a spousal trust or some other equalization method.⁶³ The plan administrator remains responsible for paying out fifty percent of the benefit under the order or contract.

It should be noted that the fifty-percent rule in section 51 deals only with "pensions" and "pension benefits", which are defined in section 1 of the Act to refer to monthly, annual, or other periodic payments. Section 51 does not expressly mention lump-sum payments. It would appear, therefore, that lump-sum payments on termination, death, or insolvency are not subject to section 51(2), which prohibits allocating to the non-member spouse more than fifty percent of the "pension benefits".⁶⁴ Pursuant to the assignment provisions of section 65(3), it would seem open to spouses to divide lump-sum payments out of a pension plan on termination of employment without being subject to the fifty-percent rule.

It should also be noted that the limitation contained in section 51(2) applies only to orders mentioned in section 51(1) of the *Pension Benefits Act*—that is,

⁶² Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991), at 520.

⁶³ Patterson, *supra*, note 33, at 243. See, also, Sheryl Smolkin and Janet Downing, *Family Law: Voodoo Economics for Women[:] Pension Credit-Splitting Pitfalls* (January 29, 1993) (paper prepared for 1993 Institute of Continuing Legal Education, Canadian Bar Association — Ontario), at 30.

⁶⁴ See, also, Ian J. McSweeney and William F. Chinery, "Pensions and Family Law Act", ch. 20 of Family Law reference materials (November 1993) (materials prepared for Law Society of Upper Canada, 35th Bar Admission Course on Family Law), at 20-13.

orders made pursuant to property division provisions contained in Part I of the *Family Law Act* and domestic contracts as defined by Part IV of the *Family Law Act*. Orders made under the support provisions contained in Part III of the *Family Law Act* are not subject to the fifty-percent rule contained in section 51(2).⁶⁵ Consequently, under the *Pension Benefits Act*, it is possible to assign one hundred percent of the pension where the assignment is made pursuant to a court order relating to support, or where the assigned benefit is in the form of a lump-sum payment on death, termination, or plan wind-up.⁶⁶

(c) DEFINITION OF SPOUSE

Section 51 of the *Pension Benefits Act* provides that a domestic contract or order that divides a pension benefit is effective on either the date the pension commences or the normal retirement date. The provisions of section 51 refer to "spouses" and "spouse".⁶⁷ The *Pension Benefits Act* defines "spouse" as "either of a man and a woman" who are married to each other or who, being unmarried to each other, have been living together for three years or have a relationship of some permanence as the parents of a child.⁶⁸ It does not, therefore, include former spouses.⁶⁹ As a result, even though the parties may have been married at the time the domestic contract or order was made, when the non-member spouse wishes to obtain payment out of the pension he or she will no longer be the spouse of the member. It is not clear, therefore, because of the definition of "spouse", whether former spouses are entitled to a share of the pension benefit.

6. THE NEED FOR REFORM

(a) INTRODUCTION

The Commission has a number of additional concerns with the current regime under the *Pension Benefits Act* for dividing pensions at source. These include the lack of security for a non-member spouse, the ongoing

⁶⁵ *Ibid.*, at 20-8.

⁶⁶ It should be noted that pension assignments of one hundred percent are also possible under any "if and when" agreement or order under the *Family Law Act*, *supra*, note 8, where the member spouse is required to hold the pension benefit in trust for the non-member spouse.

⁶⁷ *Pension Benefits Act*, *supra*, note 40, s. 51(3), (5).

⁶⁸ *Ibid.*, s. 1 "spouse".

⁶⁹ The inclusion of common-law spouses under the definition of "spouse" in the *Pension Benefits Act*, *supra*, note 40, and its exclusion under Part I of the *Family Law Act*, *supra*, note 8, creates further confusion.

interdependency between the spouses, and the failure to provide for an immediate transfer of the pension interest to the non-member spouse at the time of marriage breakdown. Notwithstanding these inadequacies, the Commission views the general concept of an “if and when” arrangement as meritorious. In our view, an “if and when” arrangement under the *Pension Benefits Act* has a number of advantages over a cash settlement or transfer of other assets under the *Family Law Act*. The most obvious advantage is that the member spouse does not have to effect equalization with a money payment or with a transfer of other property. In situations where the pension benefit constitutes the largest value of all family property, this advantage is particularly attractive. As well, some non-member spouses would prefer to have a pension to provide for post-retirement security, rather than have the value of their portion of the pension benefit paid to them at the time of marriage breakdown. The remainder of this chapter will focus on deficiencies in the current regime for “if and when” arrangements under the *Pension Benefits Act*.

(b) LACK OF SECURITY AND ONGOING INTERDEPENDENCY

The current “if and when” approach creates considerable uncertainty for the non-member spouse because of the delay in payment. The interest of the non-member spouse is affected by decisions of the member. “If and when” arrangements also require ongoing contact between spouses, as well as continual reporting, accounting, and consulting between the spouses. This problem is particularly acute in the case of spousal trusts, but is also an issue with respect to plan-administered “if and when” arrangements. While the provisions of the *Pension Benefits Act* make it possible to reduce the continuing relationship of economic interdependence involved in “if and when” arrangements to some extent, the legislation still ties the two parties together.

Section 51(1) provides that the non-member spouse cannot become entitled to payment of a pension benefit before the earlier of the member spouse’s normal retirement date or the date the pension matures under the terms of the plan. As a result, at the time of marriage breakdown, the non-member spouse does not acquire any entitlement in the member’s pension itself, only in the benefits that are actually paid out under the plan. The kind of benefits that will be paid, their value, and their duration, will depend on a number of factors personal to the member. These include, for example, the member’s life expectancy, whether the member remains in employment until retirement, and the continued solvency of the pension plan. In many cases, the interests of the member spouse and the non-member spouse will come into conflict on these issues.

Consequently, there is no guarantee that the non-member spouse will receive the benefits agreed on in the settlement, because the non-member spouse's entitlement is contingent on the member reaching retirement and receiving a pension. Subject to the limited protection currently available under the *Pension Benefits Act*, if the member predeceases the non-member spouse, the non-member spouse's interest in the pension benefit will terminate.⁷⁰ The non-member spouse's entitlement also depends on the elections made by the member as to the form of the pension received, the retirement date, or other options available to the member. Moreover, the member may decide to terminate employment. As a consequence, there will be no growth in the pension benefit from the termination date to retirement (except to the extent that the benefit is indexed after termination). Finally, the non-member spouse will have to monitor the member's activities to ensure that the member's actions do not adversely affect the value of the non-member spouse's share in the pension benefits. This approach requires that the spouses maintain a relationship, long after the marriage has broken down. The lack of security inherent in the current "if and when" provisions has been criticized in the following terms:⁷¹

The spouse's entitlement is ... at risk to the extent that the member may choose to work beyond normal retirement date, take any other action which may affect the timing of payment or the value of the benefits such as early termination, or die before the benefits have been paid out of the pension.

Attempts have been made to provide some security for the interests of non-member spouses under "if and when" arrangements by including certain terms in "if and when" orders and contracts. These have included the following provisions:

- (1) The member is not to do any act that would prejudice the interest of the non-member spouse.⁷²
- (2) The member is to provide the non-member spouse with copies of all communications sent to him or her by the plan administrator, and the member is to send a copy of the court order to the plan.⁷³

⁷⁰ This situation is ameliorated somewhat by s. 48(13) of the *Pension Benefits Act*, *supra*, note 40, which provides that an assignment of pre-retirement death benefits may be made in a domestic agreement or order, as well as s. 51(5), which provides for an assignment of the member's interest on termination of employment.

⁷¹ Ontario, Ministry of Financial Institutions (now Ministry of Finance), *Building on reform: Choices for tomorrow's pensions* (March 1989), at 82.

⁷² Campbell and Thomson, *supra*, note 47, at C-35.

⁷³ *Ibid.*

- (3) Where the member retires before the time when he or she would receive an reduced pension, the member is to pay the non-member spouse a lump sum equal to the capitalized amount of the difference in benefits between what the non-member spouse will receive and what he or she would have received had the member not retired at a reduced pension.⁷⁴
- (4) Where the member retires after the age at which he or she would receive an unreduced pension, the member is to pay to the non-member spouse, commencing at the actual date of retirement, an amount equal to what he or she would have received if the member had retired at the early retirement date.⁷⁵
- (5) The member is to make all elections, designations, nominations, or other directions that would affect the non-member spouse's interest with the approval of the non-member spouse.⁷⁶
- (6) The member is to provide all information requested by the non-member spouse regarding the plan.⁷⁷
- (7) To provide for the circumstances arising from the death of the member, the member is to designate the non-member spouse as a beneficiary of death benefits.⁷⁸
- (8) To address income tax liability, "(1) the ... member pays tax on the full amount of the pension and divides the net amount with the spouse, (2) the ... member pays the spouse his or her portion of the gross amount of the pension but then gets reimbursed ... for income tax, based on some agreed-upon formula, or (3) the payment from the plan member to the spouse is characterized as a periodic support payment so that the payor can deduct and the recipient includes the sum in income for tax purposes".⁷⁹

⁷⁴ *Ibid.*, at C-36.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at C-35.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at C-36.

⁷⁹ Aitken, *supra*, note 23, at 249.

- (9) The member is to provide an alternative method of satisfying the outstanding equalization payment.⁸⁰
- (10) The member is to maintain life insurance, designating the non-member spouse as a beneficiary in the instance of pre- and post-retirement death.⁸¹

However, notwithstanding the inclusion of these terms in orders and contracts evidencing "if and when" arrangements, and notwithstanding the provisions of the *Pension Benefits Act* which are similarly designed to provide some protection for the interest of the non-member spouse in the pension, non-member spouses are often unable to collect their share of the pension benefit. Since the "if and when" approach is currently a method of meeting an equalization payment, the non-member spouse's failure to receive a pension for any reason means that the non-member spouse has received less than he or she ought to have received on marriage breakdown. As such, the lack of security in this method of sharing pensions as family property is inconsistent with the philosophy behind the *Family Law Act*.

(c) LACK OF IMMEDIATE TRANSFER OPTION

Another general problem found in the current provisions of the *Pension Benefits Act* concerns the inability to effect a transfer of a pension interest at the time of marriage breakdown. Section 65(3) of the *Pension Benefits Act* permits the assignment of money payable under a pension plan where the money would otherwise be transferred out of the plan. There is no provision for a transfer of a lump sum out of the plan at the time of marriage breakdown. As a result, spouses are seriously limited in their options. They must settle for cash or property under a *Family Law Act* equalization payment, or an "if and when" arrangement that can be unpredictable, risky, and ties the spouses together long after marriage breakdown.

⁸⁰ Campbell and Thomson, *supra*, note 47, at C-35.

⁸¹ Janet G. Downing, *Pensions: Workshops[:] Pensions as Family Property* (September 18, 1992) (paper prepared for Canadian Bar Association — Ontario, Continuing Legal Education, workshops on pensions), at 29, and Campbell and Thomson, *supra*, note 47, at C-35 to C-36.

The Pension and Benefits Law Section of the Canadian Bar Association — Ontario criticized the current legislation and recommended that transfers be available on the date of marriage breakdown:⁸²

It is our view that more flexibility should be provided to parties in structuring division of assets on marital breakdown. Maximum flexibility can only be afforded to parties if Ontario pension legislation is amended to permit assignment or 'splitting' of accrued pension credits on marital breakdown as is currently permitted under federal pension legislation. It is therefore our view that it would be preferable for changes to the *Family Law Act* to be made in conjunction with appropriate amendment to pension legislation. We recognize, however, that this may not be possible and that an interim measure may be necessary, pending pursuit of amendment to the *Pension Benefits Act*.

7. CONCLUSION

In the Commission's view, the options currently available for dealing with pension assets for equalization purposes are inadequate and, in particular, the provisions of the *Pension Benefits Act* concerning plan-administered "if and when" arrangements need reform. The Commission recommends, therefore, that these provisions be amended to ensure that the pension division-at-source scheme set out in chapter 7 applies to future instances of pension division at source, and that the recommendations in this report apply retroactively to any existing pension division arrangements made by domestic contract or court order, where the plan administrator has not effected the division. As a result, any agreement or order not implemented prior to the proposed legislation coming into force could be brought under the new provisions for pension division at source. The details of the Commission's retroactivity recommendations are set out in chapter 6.

The Commission does not wish to make recommendations regarding the availability of spousal "if and when" arrangements not involving plan administrators. The Commission, while concerned about the operation of spousal trusts, believes that the parties should nevertheless have that option. In particular, the Commission notes that a spousal trust, in some circumstances, may be the only method of settling a pension asset where that pension is located outside Ontario.

⁸²

Canadian Bar Association — Ontario, submission to the Ontario Law Reform Commission (December 16, 1992) (supplement to the submission of December 6, 1991), at 1-2 (footnotes omitted).

CHAPTER 4

REFORMS AND PROPOSALS FOR REFORM IN CANADA

1. INTRODUCTION

Until comparatively recently, pension benefits in Canada were not uniformly considered to be assets subject to division on marriage breakdown. Today, however, every province in Canada includes pension benefits in assets to be shared upon marriage breakdown.¹ This chapter discusses the various pension division schemes that have been adopted by federal and provincial jurisdictions. There have been a number of calls for legislative reform, most notably by the Law Reform Commission of British Columbia,² the Alberta Institute of Law Research and Reform,³ and the Ontario Ministry of Financial Institutions.⁴ This chapter also examines these various proposals.

There are two fundamental ways in which pension benefits can be distributed between spouses on marriage breakdown. The first method involves a private settlement between spouses and does not require any participation by the pension plan administrator. The second requires that the plan administrator facilitate the actual division of the pension benefit.

(a) PENSION DIVISION BY PRIVATE SETTLEMENT

A private settlement can take a number of different forms. For example, the member spouse can retain all of the rights to the pension benefit and simply compensate the non-member spouse for his or her share of it, either by a lump-

¹ E. Diane Pask and Cheryl A. Hass, *Division of Pensions* (Calgary: Carswell, looseleaf), ch. I.

² *Report on the Division of Pensions on Marriage Breakdown*, Report No. 123 (Vancouver: Ministry of Attorney General, January 1992) (hereinafter referred to as "B.C. Report No. 123"). The proposed legislation in B.C. Report No. 123 is reproduced *infra*, Appendix D.

³ Alberta Institute of Law Research and Reform (now Alberta Law Reform Institute), *Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown*, Report No. 48 (Edmonton: June 1986) (hereinafter referred to as "Alta. Report No. 48").

⁴ Ontario, Ministry of Financial Institutions (now Ministry of Finance), *Building on reform: Choices for tomorrow's pensions* (March 1989).

sum payment of cash or the transfer of some other asset. Alternatively, the member spouse can simply agree to pay a share of the pension benefit directly to the non-member spouse once the pension comes into pay. This is known as a "spousal trust" or a "spousal 'if and when' arrangement".

(b) PENSION DIVISION INVOLVING PLAN ADMINISTRATOR

Pension division involving the plan administrator can be divided into the following two categories:

- (1) **Transfer:** The plan administrator is responsible for calculating the value of the pension at a prescribed point in time, for example, at the time of marriage breakdown. The plan then transfers a portion of this amount into another pension vehicle for the non-member spouse, such as a locked-in registered retirement savings plan (RRSP), deferred annuity, or another pension plan with the permission of that plan.
- (2) **Benefit split:** The plan administrator is responsible for paying two benefits out of the plan, one to the member spouse and the other to the non-member spouse. In some cases, an account is created for the benefit of the non-member spouse at the time of marriage breakdown. In other cases, the payment is divided between the spouses at the time of retirement.

Of the two options above, only the second option, a benefit split in the form of an "if and when" order, is currently available in Ontario. The pension division provisions in Ontario effectively prohibit the assignment of any money payable under a pension plan prior to the member's retirement, termination of employment, or death, or the winding-up of the plan.⁵

Four Canadian provinces—Manitoba,⁶ Saskatchewan,⁷ Quebec,⁸ and New Brunswick⁹—have amended their pension legislation to permit a transfer out of the pension plan at the time of marriage breakdown. The federal government has also made this option available for pensions that fall under federal jurisdiction.¹⁰

⁵ *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 65(3).

⁶ *The Pension Benefits Act*, R.S.M. 1987, c. P32 (also C.C.S.M., c. P32).

⁷ *The Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001.

⁸ *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1.

⁹ *Pension Benefits Act*, S.N.B. 1987, c. P.5.1.

¹⁰ Both a benefit split and transfer are available for pensions governed by the *Pensions Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (2nd Supp.). Only a transfer is available for pensions governed by the *Pensions Benefits Division Act*, S.C. 1992, c. 46 (Schedule II).

The pension legislation in effect in British Columbia,¹¹ Nova Scotia,¹² and Prince Edward Island¹³ does not permit a transfer at the time of marriage breakdown.

In addition to the transfer option, a number of Canadian provinces provide for a benefit split on marriage breakdown whereby, commencing at the date of the member spouse's retirement, the plan administrator is required to make monthly payments to the non-member spouse in respect of his or her share of the pension asset. These provinces are Ontario, Nova Scotia, Prince Edward Island, Manitoba, and Quebec. Legislation recently passed in British Columbia¹⁴ provides for a benefit split on the actual retirement date of the member. Federally, the *Pension Benefits Standards Act, 1985*¹⁵ provides for a benefit split at the time of marriage breakdown.

Only Alberta¹⁶ and Newfoundland¹⁷ do not provide for any plan-administered option for pension division.¹⁸

2. JURISDICTIONS PROVIDING FOR TRANSFERS OR FOR TRANSFERS AND BENEFIT SPLITS

(a) MANITOBA

In 1983, Manitoba introduced the first provincial legislative scheme of pension division in Canada.¹⁹ Under this legislation,²⁰ a "pension benefit credit", defined as the value of the benefits provided under the pension to which the

¹¹ *Pension Benefits Standards Act*, S.B.C. 1991, c. 15.

¹² *Pension Benefits Act*, R.S.N.S. 1989, c. 340.

¹³ *Pension Benefits Act*, S.P.E.I. 1990, c. 41 (not yet proclaimed).

¹⁴ *Family Relations Amendment Act, 1994*, S.B.C. 1994, c. 6, reproduced *infra*, Appendix E. This Act is to come into force by regulation of the Lieutenant Governor-in-Council.

¹⁵ *Supra*, note 10.

¹⁶ *Employment Pension Plans Act*, S.A. 1986, c. E-10.05.

¹⁷ *Pension Benefits Act*, R.S.N. 1990, c. P-4.

¹⁸ With the exception of civil servant pension plans in Newfoundland, which are discussed *infra*, this ch., sec. 4(b).

¹⁹ *Act to Amend the Pension Benefits Act*, S.M. 1982-83-84, c. 79, s. 19. See, now, *The Pension Benefits Act* (Man.), *supra*, note 6, s. 31, as am. by S.M. 1989-90, c. 48, ss. 2, 3; S.M. 1992, c. 36, s. 13; and the Pension Benefits Regulation, Man. Reg. 188/87R, s. 24.

²⁰ *The Pension Benefits Act* (Man.), *supra*, note 6, s. 31(2), as am. by S.M. 1989-90, c. 48, s. 2; S.M. 1992, c. 36, s. 13(1).

employee has become entitled,²¹ was divided equally between the spouses. The equal division of the pension benefit credit or pension payment was mandatory where there was an order made by the Court of Queen's Bench under *The Marital Property Act*²² dividing the family assets of a person, or an agreement dividing the family assets of spouses or parties to a common-law relationship.

The mandatory equal division under the Act led to a variety of difficulties and was criticized as being too rigid. For example, in the event both spouses had pensions of similar value, dividing the pensions between the spouses was costly and reduced the combined benefits received because of the method prescribed for valuing the pension. For this reason, the legislation was amended in 1990 to provide that, where both spouses were members of pension plans and the pensions were valued within twenty percent of one another, on the consent of both spouses, the spouse with the larger pension benefit credit or larger pension payments could transfer one-half of the net difference in the pension values to the other spouse, thereby avoiding any need to divide both pensions equally between the spouses.²³

The Manitoba legislation was further amended in 1992 to enable parties to opt out of the mandatory division scheme, thereby allowing the parties to settle claims to a pension by the transfer of other assets. *The Pension Benefits Act*²⁴ now provides that the mandatory division provisions²⁵ cease to apply when the parties have had independent legal advice, when they have received a statement from the pension plan administrator indicating the pension benefit credit or payments to which each spouse would be entitled if the division were to take place, and when they have entered into a written agreement specifying that pension credits will not be divided between them. These amendments to the Manitoba legislation enable spouses to determine between themselves the most appropriate way to settle a claim to pension entitlements.

Under the current Manitoba legislation, when a pension benefit is divided, a pension benefit credit is valued as if the member had terminated employment on the date of separation from the spouse or common-law partner.²⁶ The only part of

²¹ *Ibid.*, s. 1(1).

²² R.S.M. 1987, c. M45 (also CCSM, c. M45).

²³ *The Pension Benefits Act* (Man.), *supra*, note 6, s. 31(3.1), as en. by S.M. 1989-90, c. 48, s. 3.

²⁴ *Ibid.*, s. 31(6), as en. by S.M. 1992, c. 36, s. 13(3).

²⁵ *Ibid.*, s. 31(2).

²⁶ Pension Benefits Regulation (Man.), *supra*, note 19, s. 24(1), as am. by Man. Reg. 223/88, s. 1.

the pension benefit credit available for division is that which accrued during the marriage (or common-law relationship).²⁷ The Act sets out two ways of dividing a pension benefit credit depending on whether the relationship ended before or after retirement.²⁸ The spouse may²⁹

- (1) receive a portion of the payments payable under the pension plan (a post-retirement division); or
- (2) transfer the portion of the pension benefit credit to which the spouse is entitled to another pension plan, including a locked-in retirement account (a pre-retirement division).

In a pre-retirement pension division, the commuted value of the pension accumulated during the marriage (based on the termination value) is divided equally between the parties, and that portion credited to the non-member is transferred to a locked-in pension vehicle. In a post-retirement division, the plan administrator pays out the portion to which the non-member spouse is entitled, issuing separate cheques to the member and non-member spouse.

(b) NEW BRUNSWICK

New Brunswick legislation provides only for a transfer at the time of marriage breakdown and does not provide for a benefit split of an unmatured pension. The New Brunswick *Pension Benefits Act*³⁰ provides that, if a court orders pension benefits to be divided,

the commuted value of the benefits shall be determined in accordance with this Act and the regulations as of the date of marriage breakdown and shall be divided in accordance with the order of the court.

Where there is a division of pension benefits, the non-member spouse is dealt with like a terminated member. The non-member spouse may require the plan administrator to transfer the commuted value of the non-member spouse's share to another pension plan or a prescribed retirement savings arrangement, or to purchase a deferred life annuity.³¹ In the absence of a direction by the non-

²⁷ *Ibid.*, s. 24(3).

²⁸ *The Pension Benefits Act* (Man.), *supra*, note 6, s. 31(4).

²⁹ Pension Benefits Regulation (Man.), *supra*, note 19, s. 24(5), as am. by Man. Reg. 223/88, s. 1; Man. Reg. 23/92, s. 15.

³⁰ *Supra*, note 9, s. 44(1).

³¹ *Ibid.*, ss. 36(1), 44(2).

member spouse to the plan administrator, the non-member spouse is deemed to have directed the plan administrator to purchase a deferred life annuity.³²

Once the benefits have been divided, the non-member spouse has no further rights against the plan.³³ A division of benefits under a pension plan or the division of a pension cannot result in the reduction of the commuted value of a member's or former member's pension benefits by more than fifty percent.³⁴ However, a court may order an alternative division of the pension.³⁵ The value of the pension available for division is the commuted value which is to be calculated in accordance with the Act and the regulations.³⁶ The legislation does not make the commuted value binding for *Marital Property Act*³⁷ purposes.

(c) SASKATCHEWAN

The Pension Benefits Act, 1992,³⁸ in Saskatchewan, provides two options for pension division at source on marriage breakdown. The plan administrator may transfer a portion of the commuted value to another pension vehicle, or the plan may provide a pension to the non-member spouse as if he or she were a former member.³⁹ A pension division can occur pursuant to a court order or an "interspousal agreement".⁴⁰ A division of the pension benefits "must not reduce the member's commuted value to less than 50% of the member's commuted value prior to the division".⁴¹

In the case of a defined contribution plan, where the marriage breakdown occurs before the pension matures, the parties are restricted to a transfer of a portion of the accumulated value to another pension vehicle.⁴² Where a defined contribution plan is already in pay, the value of the benefit is to be calculated "as

³² *Ibid.*, s. 44(3).

³³ *Ibid.*, s. 44(4).

³⁴ *Ibid.*, s. 44(6), (13).

³⁵ *Ibid.*, s. 44(9).

³⁶ *Ibid.*, s. 44(5).

³⁷ S.N.B. 1980, c. M-1.1.

³⁸ *Supra*, note 7.

³⁹ *Ibid.*, s. 48(1).

⁴⁰ *Ibid.*, s. 46(2).

⁴¹ *Ibid.*, s. 46(3).

⁴² *Ibid.*, s. 47(5).

a division of the pension in accordance with the order or agreement".⁴³ Therefore, in a post-retirement separation, where the pension is a defined contribution plan, the parties are restricted to a benefit split.

The Saskatchewan legislation provides for a different regime in relation to defined benefit plans. In the event the member or former member "has not become eligible to receive a pension without reduction", that is, where the member is not entitled to retire on an unreduced early retirement benefit, only a transfer of a portion of the commuted value is available. The value of the pension is calculated on the assumption that the member terminated membership on marriage breakdown.⁴⁴

Where the member of a defined benefit plan "is eligible to receive a pension without reduction", that is, where he or she is entitled to retire on an unreduced pension, a portion of the commuted value of the pension may be transferred to another pension vehicle, or the pension may be divided on the basis of a benefit split, that is, "a division of the unreduced pension when the pension becomes payable".⁴⁵ Where the pension is in pay, a defined benefit pension plan is to be divided by way of a benefit split.⁴⁶

In summary, where the plan is a defined benefit plan and the separation is a pre-retirement one, the options will vary according to whether the member is entitled to an unreduced pension. Where the member is entitled to an unreduced pension, the parties will have the choice of a transfer or a benefit split. Where the member is not entitled to an unreduced pension, the parties will be restricted to a transfer. Where a matured defined benefit plan is to be divided, the parties are restricted to a benefit split.

(d) QUEBEC

The *Supplemental Pension Plans Act*⁴⁷ provides for the partition of pension benefits between spouses in the event of separation from bed and board, divorce, or annulment of marriage, on application to the pension committee in writing. The definition of spouse includes those who have been living in a conjugal relationship for not less than three years or not less than one year if they have a

⁴³ *Ibid.*, s. 47(6).

⁴⁴ *Ibid.*, s. 47(2).

⁴⁵ *Ibid.*, s. 47(3).

⁴⁶ *Ibid.*, s. 47(4).

⁴⁷ *Supra*, note 8, s. 107.

child.⁴⁸ Benefits may be partitioned between spouses based on the *Civil Code of Quebec* or by a court judgment.⁴⁹ Once parties apply to the pension committee for partition, they are entitled to a statement of the benefits accumulated by the member under the plan, valued at the date of institution of the action. The non-member spouse is also entitled to examine the plan documents.⁵⁰ The partition of pension benefits cannot confer on the non-member spouse more than fifty percent of the total value of the benefits accumulated by the member under the pension plan.⁵¹

In the Quebec system, it is the plan administrator who must provide information on benefits and their value. The regulations under the Act⁵² outline how to divide and value pensions subject to the legislation.⁵³

1. The member and spouse must apply in writing to the Pension Committee (the plan administrator in Quebec) to receive a statement of the member's benefits. The application must include prescribed information.
2. Within 90 days of receipt of the application, the Pension Committee provides a statement of benefits accumulated by the member and the value of the benefits, as prepared by the plan's actuary.
3. The value of the benefits is determined using the plan's assumptions as though the member had terminated employment on the date of the institution of the action, and does not appear to allow for future contingent vesting.
4. The value of the benefits during the marriage is determined by prorating the benefit for the period the individual was a member, in accordance with a formula established in the Regulations.
5. Both spouses receive the statement, and may dispute it (rarely done). The spouses then apply for partition by submitting a written application and appropriate documentation. The benefit is not required to be split but the

⁴⁸ See *ibid.*, s. 85, where "spouse" is defined.

⁴⁹ *Ibid.*, s. 107.

⁵⁰ *Ibid.*, s. 108.

⁵¹ *Ibid.*, s. 110. This is unlike Ontario, where the fifty-percent rule applies to those benefits accrued only during the marriage: see the *Pension Benefits Act* (Ont.), *supra*, note 5, s. 51(2).

⁵² Regulations respecting Supplemental Pension Plans, O.C. 1158-90, Division V, as am. by O.C. 568-91, ss. 4-6.

⁵³ Janet G. Downing, *Pensions as Family Property* (September 18, 1992) (paper prepared for the Canadian Bar Association — Ontario, Continuing Legal Education, workshop on pensions), at 24-25.

spouse must notify the Pension Committee of the waiver of entitlement to a split.

6. Unless the application to partition the benefit is joint, the Pension Committee must send notice of the application to partition to the non-applicant spouse. Interest is credited until actual payment of the benefit. The spouses have 60 days to contest the valuation. If it is not contested, the Pension Committee has 120 days to transfer the entitlement on a locked-in basis to the spouse.
7. The Pension Committee will adjust the member's benefit at his or her retirement to reflect the division.

(e) *PENSION BENEFITS STANDARDS ACT, 1985*

The federal *Pension Benefits Standards Act, 1985 (PBSA)*⁵⁴ provides for the division of pensions at source with respect to those pension plans covering employees in "included employment" as defined in the Act.⁵⁵ This applies to private sector plans in areas within federal jurisdiction, including banks and interprovincial and international transportation. Those provisions of the *PBSA* do not, however, apply to areas of "included employment" where "provincial property law" applies.⁵⁶ The *PBSA* provides that a "pension benefit, pension benefit credit or other benefit under a pension plan that is subject to provincial property law pursuant to this section is not subject to the provisions of this Act relating to the valuation or distribution of pension benefits, pension benefit credits or other benefits under a pension plan, as the case may be".⁵⁷

Under the *PBSA*, a member or former member of a pension plan that falls under the Act may assign all or part of his or her pension benefit, pension benefit credit, or other benefit under the plan to his or her spouse on marriage breakdown or separation.⁵⁸ The division of the pension may be the result of an agreement or it may be ordered by the court.⁵⁹ The definition of spouse varies depending on whether the division is made pursuant to a court order or an agreement. Where the division is made pursuant to a court order, "spouse" has the same meaning it has in the applicable provincial property law. Where the division is made pursuant to an agreement, "spouse" includes persons of the

⁵⁴ *Supra*, note 10.

⁵⁵ *Ibid.*, s. 4(4).

⁵⁶ *Ibid.*, s. 25(2).

⁵⁷ *Ibid.*, s. 25(3).

⁵⁸ *Ibid.*, s. 25(4).

⁵⁹ *Ibid.*, s. 25(5).

opposite sex in a "conjugal" relationship who have cohabited for at least one year.⁶⁰

The provisions of the *PBSA* provide that the plan administrator must divide and administer the pension benefit, pension benefit credit, or other benefit "in prescribed manner" in accordance with the court order or agreement once all appeals have been exhausted or time for appealing has expired.⁶¹ For the purposes of the division, the non-member spouse is treated like a member who has terminated employment.⁶² The non-member spouse has the option of transferring pension benefit credits into another pension plan with permission of the plan or into a locked-in RRSP, or the option of purchasing an immediate or deferred life annuity.⁶³ All transfers are subject to the solvency restrictions in the Act, and the Superintendent of Financial Institutions may require that a transfer be subject to certain terms and conditions.⁶⁴ The aggregate value of the pension benefit paid to the member and non-member spouses cannot exceed the value of the pension benefit that would have been payable to the member had the division not occurred.⁶⁵ The legislation gives both the member and the spouse a right to information about the plan.⁶⁶

The non-member spouse also has the option of a deferred pension in the same plan. In this instance, the application of the *PBSA* results in a complete separation of the interests of the spouses as of the effective date of the division.⁶⁷ Where the non-member spouse elects a deferred pension, the non-member spouse is treated like a former member and is entitled to a pension, based on the member's period of employment and salary at the time of the division, once the non-member spouse reaches the pensionable age under the plan. The non-

⁶⁰ *Ibid.*, ss. 2(1), 25(1) "spouse".

⁶¹ *Ibid.*, s. 25(5).

⁶² *Ibid.*, s. 25(4), and Pension Benefits Standards Regulations, 1985, SOR/87-19, s. 18(4)(c), as am. by SOR/90-363, s. 4; SOR/94-0384, s. 4.

⁶³ *PBSA*, *supra*, note 10, ss. 25(4), 26(1).

⁶⁴ *Ibid.*, s. 26(4). The Superintendent of Financial Institutions is appointed under s. 5(1) of the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I, and is charged with the administration of the Act: *PBSA*, *supra*, note 10, s. 2(1) "Superintendent", as am. by R.S.C. 1985, c. 18 (3rd Supp.), s. 38.

⁶⁵ *PBSA*, *ibid.*, s. 25(8).

⁶⁶ *Ibid.*, s. 28.

⁶⁷ *Ibid.*, s. 25(4).

member spouse is also entitled to any other benefit or option that a former member would be entitled to under the plan with certain exceptions.⁶⁸

The *PBSA* also provides for the division of a pension that is in pay.⁶⁹ The *PBSA* specifically permits the division of a joint-and-survivor pension benefit. The joint-and-survivor pension becomes payable as two separate pensions, one to the member and the other to the non-member spouse, but the aggregate value of the two separate pensions cannot be less than the actuarial value of the joint-and-survivor benefit.⁷⁰

(f) *PENSION BENEFITS DIVISION ACT*

The *Pension Benefits Division Act (PBDA)*⁷¹ provides for the division, on the breakdown of a marriage or common-law relationship, of pension benefits accrued under several federal public service pension plans.⁷² The *PBDA* implements court orders or spousal agreements providing for the division of a member's pension benefits by allowing a plan member, his or her spouse, or a former spouse, to apply for a division of the member's pension benefits that accrued during the period of cohabitation.⁷³

The non-member spouse does not have to wait for the plan member's retirement to receive a share of his or her former spouse's pension. Providing the terms of the *PBDA* can be met, the non-member spouse may apply for a division as soon as there is a court order or spousal agreement providing for the division. Spouses who have divorced, separated, or had their marriage annulled are eligible for division of pension benefits, providing there is a court order for the

⁶⁸ *Ibid.*, ss. 17(1)(a), (b), 21(2)-(6), 25(4).

⁶⁹ *Ibid.*, ss. 2(1) "pension benefit", 25(4).

⁷⁰ *Ibid.*, ss. 2(1) "joint and survivor benefit", 25(7).

⁷¹ *Supra*, note 10. Regulations calculating the value and division of the member's benefit have been promulgated: see Pension Benefits Division Regulations, SOR/94-612.

⁷² The public service pension plans subject to the *PBDA* include the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36; the *Royal Canadian Mounted Police Pension Continuation Act*, R.S.C. 1970, c. R-10; the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11; the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17; the *Members of Parliament Retiring Allowances Act*, R.S.C. 1985, c. M-5; the *Defence Services Pension Continuation Act*, R.S.C. 1970, c. D-3; the *Diplomatic Service (Special) Superannuation Act*, R.S.C. 1985, c. D-2; the *Special Retirement Arrangements Act*, S.C. 1992, c. 46 (Schedule I); the *Lieutenant Governors Superannuation Act*, R.S.C. 1985, c. L-8; and the *Governor General's Act*, R.S.C. 1985, c. G-9: see *PBDA*, *supra*, note 10, s. 2 "pension plan", "spouse".

⁷³ *PBDA*, *ibid.*, s. 4(1).

division.⁷⁴ Spouses who have separated are eligible for division as well if they have lived separate and apart for at least one year and there is a spousal agreement that provides for division of the member's pension benefits.⁷⁵ The transfer out of the plan is made as soon as the division is approved.

On approval from the Minister,⁷⁶ up to fifty percent of the value of the member's accrued pension benefits can be transferred to another pension plan if the plan so permits, to a locked-in retirement savings plan or fund of the prescribed kind, or to a financial institution for a purchase of an immediate or deferred life annuity.⁷⁷ This value is to be determined by generally accepted actuarial principles set out in the regulations.

The *PBDA* does not provide for the division of periodic pension payments but only for transfers out of the plan at the time of separation. It has been suggested, however, that, since section 16(c) of the Act permits the Governor-in-Council to make regulations adapting the Act to various applicants or circumstances, regulations might be made to provide for a separate pension in the plan for the spouse.⁷⁸ However, no such regulations exist at present, and parties with a *PBDA* pension are restricted to a transfer at the date of marriage breakdown.

3. JURISDICTIONS PROVIDING FOR BENEFIT SPLITS ONLY

(a) ONTARIO

In Ontario, it is not possible to transfer a portion of the value of the pension benefit out of the plan at the time of marriage breakdown.⁷⁹ Under a plan-administered "if and when" arrangement, the non-member spouse only

⁷⁴ *Ibid.*, s. 4(2)(a).

⁷⁵ *Ibid.*, s. 4(2)(b).

⁷⁶ *Ibid.*, s. 7.

⁷⁷ *Ibid.*, s. 8.

⁷⁸ E. Diane Pask, *Retirement Security, Legislative Change and Division: The Impacts of the B.C. Pension Benefits Standards Act and the Federal Pension Benefits Division Act* (March 24, 1993) (presented to the Family Law Section of the Canadian Bar Association, Victoria, B.C.), at 23.

⁷⁹ *Pension Benefits Act* (Ont.), *supra*, note 5, ss. 51, 65(3).

acquires an interest in the benefits that are actually paid out on the retirement of the member.⁸⁰

(b) BRITISH COLUMBIA

The situation in British Columbia is complicated somewhat by the recent introduction of legislation dealing with pension division at source on marriage breakdown. Currently, this area is governed by provisions in the *Pension Benefits Standards Act*,⁸¹ passed on January 1, 1993. That legislation provides that the entitlement of any person to receive a benefit under a pension plan is subject to interests arising under an agreement or order under the *Family Relations Act*.⁸² Section 63(2) provides that agreements or court orders regarding the transfer of pension entitlements on marriage breakdown⁸³ are exempted from the non-assignment provisions of that Act. While the legislation appears to allow courts to make orders that are binding on pension plan administrators, British Columbia courts tend not to make such orders. As a result, it is difficult to determine the extent to which the various types of pension division-at-source options are available in British Columbia and to what extent plans are bound to enforce them.

The situation in British Columbia will be clarified once the *Family Relations Amendment Act, 1994*⁸⁴ comes into force. That Act, which received Royal Assent on June 2, 1994, and is to be proclaimed in force by regulation, adds Part 3.1 to the *Family Relations Act*. The provisions of the Act reflect very closely the recommendations made by the Law Reform Commission of British Columbia in its *Report on the Division of Pensions on Marriage Breakdown*.⁸⁵

⁸⁰ For a more detailed discussion of the Ontario system, see, *supra*, ch. 3.

⁸¹ *Supra*, note 11.

⁸² R.S.B.C. 1979, c. 121. The *Pension Benefits Standards Act*, *supra*, note 11, s. 64, provides as follows: "The entitlement of any person to receive a benefit under a pension plan is subject to entitlements arising under a separation agreement or order made under Part 3 of the *Family Relations Act*, or a similar order of a court outside British Columbia enforceable in British Columbia, that affects the payment or distribution of a person's benefits." It should be noted that this legislation is identical to that found in Alberta regarding pension division at source on marriage breakdown: see the *Employment Pension Plans Act*, *supra*, note 16, s. 60.

⁸³ The *Pension Benefits Standards Act*, *supra*, note 11, s. 63(2)(b) provides that s. 63(1) does not apply to the transfer of pension entitlements under "(i) a separation agreement, (ii) a declaratory judgment under section 44 of the *Family Relations Act*, (iii) an order for dissolution of marriage or judicial separation, or (iv) an order declaring a marriage null and void".

⁸⁴ *Supra*, note 14.

⁸⁵ B.C. Report No. 123, *supra*, note 2.

The *Family Relations Amendment Act, 1994* provides for a scheme of pension division at source that will be binding on plan administrators, and also provides for an optional method of pension valuation for the purpose of making "compensation payments". The provisions of this Act are discussed in considerable detail later in this chapter and in chapter 7 of this report.

(c) NOVA SCOTIA

As in Ontario, Nova Scotia legislation provides for a benefit split at the time of marriage breakdown. Under the Nova Scotia *Pension Benefits Act*,⁸⁶ a court may order that a non-member spouse receive up to one-half of the pension benefit earned during the marriage. "Pension benefit earned during the marriage" is defined to mean the proportion of the pension earned during the marriage or cohabitation for three years or more as husband and wife by a member and a person of the opposite sex.⁸⁷ The Nova Scotia legislation does not provide for a transfer of a portion of the commuted value at the time of marriage breakdown.

Where a court orders a benefit split, the non-member spouse is entitled to a share in the pension payments once the pension matures.⁸⁸ If the member spouse terminates employment before retirement, and is thus entitled to the commuted value of the pension, the plan administrator is required to pay to the non-member spouse the commuted value of that spouse's pension.⁸⁹ Where the non-member spouse dies prior to receiving a pension, his or her estate is entitled to a death benefit consisting of the "contributions plus interest made in respect of that spouse's proportion of the pension benefit earned during the marriage".⁹⁰

The payments to the non-member spouse do not cease on the death of the member spouse.⁹¹ The pension payable to the non-member spouse is subject to indexing as provided for in the pension plan.⁹² The plan administrator is required

⁸⁶ *Supra*, note 12, s. 61(3).

⁸⁷ *Ibid.*, s. 61(1)(b).

⁸⁸ The *Pension Benefits Act* (N.S.), *ibid.*, s. 61(4)(a) provides that the non-member spouse is entitled to payment commencing on "(i) the date on which payment of a pension to the member or former member commences, or (ii) the normal retirement date of the member or former member, whichever is earlier".

⁸⁹ *Ibid.*, s. 61(4)(b).

⁹⁰ *Ibid.*, s. 61(4)(c).

⁹¹ *Ibid.*, s. 61(4)(e).

⁹² *Ibid.*, ss. 17(4), 61(4)(g).

to provide prescribed information to the non-member spouse.⁹³ If the member remarries and subsequently separates, the subsequent spouse is not entitled to any interest in the pension benefit.⁹⁴ Unless the plan provides otherwise, the non-member spouse is not entitled to any benefits under the plan.⁹⁵

(d) PRINCE EDWARD ISLAND

The Prince Edward Island *Pension Benefits Act*⁹⁶ provides only for a benefit split.⁹⁷ The Act provides that, where a member is entitled to a pension benefit, the parties have separated, and there is no reasonable prospect of reconciliation, or where divorce proceedings have been commenced or an application for a declaration of nullity has been filed, a spouse may apply to the courts for division of the pension benefit earned during the marriage.⁹⁸ It also provides for division of the periodic payments commencing on the earlier of the normal retirement date or the date on which the payment commences.⁹⁹ The provisions do not allow for a transfer of a share of the commuted value effective at the time of marriage breakdown.

Where a non-member spouse receives an entitlement to periodic payments under the pension plan, he or she is not entitled to any other benefits under the plan unless the plan so provides.¹⁰⁰ The court may order that the spouse receive a proportion not exceeding one-half of the pension benefit earned during the marriage "as the court may order".¹⁰¹ Only vested benefits are subject to division under the Prince Edward Island Act.¹⁰²

If the member or former member terminates employment before retirement and elects for a transfer of the commuted value of the pension, the non-member

⁹³ *Ibid.*, s. 61(4)(h).

⁹⁴ *Ibid.*, s. 61(4)(d).

⁹⁵ *Ibid.*, s. 61(5).

⁹⁶ *Supra*, note 13.

⁹⁷ The provisions of the Prince Edward Island and Nova Scotia legislation concerning the division of pensions on marriage breakdown are substantially the same.

⁹⁸ *Pension Benefits Act* (P.E.I.), *supra*, note 13, s. 60(2).

⁹⁹ *Ibid.*, s. 60(4)(a).

¹⁰⁰ *Ibid.*, s. 60(5).

¹⁰¹ *Ibid.*, s. 60(3).

¹⁰² Pask and Hass, *supra*, note 1, at VII-34.25.

spouse may require the plan administrator to transfer a portion of the commuted value of the member's or former member's pension to another locked-in pension vehicle to the benefit of the non-member spouse.¹⁰³

Where a non-member spouse dies before receiving his or her share of the pension benefit, the estate of the spouse of the member is entitled to a refund of contributions plus interest made in respect of the spouse's proportion of the pension benefit earned during marriage.¹⁰⁴ On a subsequent marriage or separation, the subsequent spouse of the non-member spouse is not entitled to any interest in the member's plan nor is he or she entitled to a benefit from the plan.¹⁰⁵ The pension of the member is not affected by the death of the spouse, nor is the pension of spouse affected by the death of member.¹⁰⁶

4. JURISDICTIONS WITHOUT ANY PLAN-ADMINISTERED OPTION FOR PENSION DIVISION

(a) ALBERTA

The Alberta *Employment Pension Plans Act*¹⁰⁷ provides that a member's entitlement to receive a pension benefit "is subject to entitlements arising under a matrimonial property order within the meaning of the *Matrimonial Property Act*". Although this would seem to suggest that claims arising under the Alberta *Matrimonial Property Act*¹⁰⁸ may be directly enforceable against the plan, this is apparently not the case. This provision is subject to the non-assignability clause,¹⁰⁹ which provides that pension benefits may not be "assigned, charged, alienated or anticipated". Consequently, it is generally thought that the provisions of the Act do not effectively compel a plan administrator to divide and distribute

¹⁰³ *Pension Benefits Act* (P.E.I.), *supra*, note 13, ss. 49(1), 60(4)(b).

¹⁰⁴ *Ibid.*, s. 60(4)(c).

¹⁰⁵ *Ibid.*, s. 60(4)(d).

¹⁰⁶ *Ibid.*, s. 60(4)(e), (f).

¹⁰⁷ *Supra*, note 16, s. 60, as am. by S.A. 1992, c. 13, s. 44. The Act governs most pension plans within provincial jurisdiction, with the exception of various public service pension plans that are created by separate legislation. See Alta. Reg. 364/86, s. 41, as am. by Alta. Reg. 94/90, s. 13; Alta. Reg. 43/93, s. 17.

¹⁰⁸ R.S.A. 1980, c. M-9.

¹⁰⁹ *Employment Pension Plans Act*, *supra*, note 16, s. 59(1), as am. by S.A. 1992, c. 13, s. 43.

the pension interest of a member between the member and the non-member spouse.¹¹⁰

However, there are at least three cases in Alberta where the courts have ordered a pension plan to effect a division at source. In *Strachan v. Strachan*,¹¹¹ the wife was awarded a share of the husband's pension after their marriage breakdown. Trussler J. of the Alberta Court of Queen's Bench ordered TransAlta Utilities to pay directly to the wife \$200 per month plus half of the inflationary increase or supplement thereto after June 1, 1991.¹¹² Trussler J. made a similar order in the more recent case of *Chaisson v. Chaisson*,¹¹³ where an order for pension division at source was made against the Alberta Government Telephones pension plan and its administrator, Telus Corporation. Similarly, Marshall J. of the Alberta Court of Queen's Bench in *Frost v. Frost*¹¹⁴ made an order directing London Life Insurance Company to transfer to the benefit of the wife \$25,000 out of two locked-in RRSPs.

(b) NEWFOUNDLAND

The Newfoundland *Pension Benefits Act*¹¹⁵ does not allow the division of a pension at source as a means of dividing matrimonial assets on marriage breakdown. Under that Act, moneys payable under the pension plan cannot be assigned, charged, attached, or anticipated.¹¹⁶ The Act requires every registered pension plan to include a term prohibiting alienation or assignment of pension benefits.¹¹⁷

Reform of the *Pension Benefits Act* and regulations is currently being considered. Three public sector plans have been amended to provide for pension division between spouses. The *Public Service Pensions Act, 1991*¹¹⁸ provides that

¹¹⁰ Pask and Hass, *supra*, note 1, at VII-34.1 to VII-34.2.

¹¹¹ (1992), 38 R.F.L. (3d) 131.

¹¹² *Ibid.*, at 133-34

¹¹³ (1994), 2 R.F.L. (4th) 81, 152 A.R. 141 (Q.B.).

¹¹⁴ (1994), 2 R.F.L. (4th) 227, 151 A.R. 238 (Q.B.).

¹¹⁵ *Supra*, note 17.

¹¹⁶ *Ibid.*, s. 25.

¹¹⁷ *Ibid.*, s. 18(1)(b).

¹¹⁸ S.N. 1991, c. 12, s. 32(1), (2).

a spouse, as defined under the *Family Law Act*,¹¹⁹ may apply to court for a division of the pension earned during marriage. The definition of spouse does not include cohabitants. An application may be made on marriage breakdown.¹²⁰ Only those accruals or contributions made between the date of marriage and date of marriage breakdown are to be divided.¹²¹ Where a spouse of a plan member remarries, the new spouse is not eligible for entitlements.¹²² The pension plan is not liable for lump-sum payments where the parties agree to payment of such a sum.¹²³ Similar provisions have been enacted in the *Uniformed Services Pensions Act, 1991*¹²⁴ and the *Teachers' Pensions Act*.¹²⁵

5. PROPOSED REFORMS IN CANADA: PENSION DIVISION AT SOURCE

(a) INTRODUCTION

Canadian jurisdictions have taken different approaches in enacting pension division-at-source legislation. Some jurisdictions have favoured a transfer option and the creation of a benefit split on marriage breakdown, which crystallizes the interest of the non-member spouse at that time. Other provinces have favoured a benefit split that provides the non-member spouse with a share of the final retirement benefit. Legislation across Canada also varies in terms of its complexity. In some jurisdictions, legislative provisions are less complex than in others, leaving the mechanics of pension division at source to spousal agreements, court orders, and plan administrators. In an attempt to provide some guidance to provincial legislatures on the complex issue of pension division on marriage breakdown, two law reform commissions have produced extensive reports on the subject.¹²⁶ In Ontario, a recent report by the Ministry of Financial Institutions¹²⁷ has also considered this issue. These reports have tackled a difficult and complex area in an attempt to produce creative solutions to the problems faced by lawyers, the courts, and separating parties in dividing pension assets.

¹¹⁹ R.S.N. 1990, c. F-2.

¹²⁰ *Public Service Pensions Act, 1991*, *supra*, note 118, s. 32(2).

¹²¹ *Ibid.*, s. 32(5).

¹²² *Ibid.*, s. 32(6).

¹²³ *Ibid.*, s. 32(8).

¹²⁴ S.N. 1991, c. 19.

¹²⁵ S.N. 1991, c. 17.

¹²⁶ See Alta. Report No. 48, *supra*, note 3, and B.C. Report No. 123, *supra*, note 2.

¹²⁷ Ontario Ministry of Financial Institutions, *supra*, note 4.

(b) ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM

In 1986, the Alberta Institute of Law Research and Reform (the Alberta Institute) published a report on the division of pensions on marriage breakdown.¹²⁸ At that time, it was becoming increasingly apparent that the involvement of the plan administrator in pension division was necessary for an equitable and effective division of pension benefits on marriage breakdown. The Alberta report was one of the first extensive examinations of this issue in Canada. The following discussion considers the proposals for reform recommended in the Alberta report.

The Alberta Institute proposed that there be four different methods of pension division, in the following order of preference:

- (1) valuation and accounting;
- (2) valuation and division;
- (3) provision of a separate pension for the non-member spouse; and
- (4) division of the proceeds.¹²⁹

The Alberta Institute further recommended “that a method of division later in the order of preference be adopted only if all methods earlier in the preference are inapplicable or beyond the Court’s jurisdiction or would cause a result which would not be just and equitable” or cause “undue hardship”.¹³⁰

(i) Valuation and Accounting

The first method of pension division—valuation and accounting—simply retains the valuation and lump-sum settlement method available under family legislation in Alberta.¹³¹ The valuation method suggested by the Alberta Institute is a termination approach.¹³²

¹²⁸ Alta. Report No. 48, *supra*, note 3. This report followed the publication of a discussion paper: *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*, Report for Discussion No. 2 (Edmonton: May 1985).

¹²⁹ Alta. Report No. 48, *supra*, note 3, at 48, Recommendation No. 20.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, at 18-19.

¹³² The Alta. Report No. 48, *ibid.*, at 50-63, made a variety of recommendations regarding the valuation of pensions and adopted the termination method of valuation. It proposed that a pension under a defined benefit plan be valued at the greater of (a) the amount that the member spouse would be entitled to if his or her participation in the pension plan had

(ii) Valuation and Division

Where a valuation and accounting is inapplicable or unfair (for example, because the member spouse lacks sufficient assets), a second method of pension division is available: valuation and division.¹³³ Under this option, the value of the pension is determined, and the plan administrator pays to the non-member spouse or transfers to another locked-in pension vehicle an amount of money equal to the value of the non-member spouse's share of the pension benefit. This money can be paid directly in cash to the non-member or can be transferred into an RRSP or into a registered pension plan.¹³⁴ An amount paid in cash would be considered taxable income in the hands of the non-member spouse. The Alberta Institute proposed that "an overriding pension policy against payment out of the money out [*sic*] of the pension system" should be considered before introducing legislation providing the cash settlement option out of the plan.¹³⁵ The member spouse's pension would be reduced to reflect the payment to or for the non-member spouse, and the Alberta Institute suggested that the reduction method should be developed in regulations. Under the proposals by the Alberta Institute, a valuation and division should not be made where it would prejudice the solvency of a pension plan. The Alberta Institute recommended that the plan administrator have the responsibility of providing evidence of prejudice.¹³⁶

(iii) Provision of Separate Pension

The third method of pension division is the provision of a separate pension for the non-member spouse.¹³⁷ According to the Alberta Institute, there may be cases in which a valuation and division at the time of marriage breakdown will not be appropriate because it might affect the solvency of a pension plan.¹³⁸ Examples given in the Alberta report where this might occur are a small pension plan or a newly established plan. In these circumstances, a court could order a plan to provide a separate pension for the non-member spouse.

terminated at the time of division, and (b) the value of the deferred pension that the member would have earned at the time of division: *ibid.*, at 52, 54.

¹³³ *Ibid.*, at 20-23, 43.

¹³⁴ *Ibid.*, at 20.

¹³⁵ *Ibid.*, at 21.

¹³⁶ *Ibid.*, at 21-22.

¹³⁷ *Ibid.*, at 23-27.

¹³⁸ *Ibid.*, at 44.

Under this scheme the plan administrator is required to establish a separate pension in favour of the non-member spouse, treating the non-member spouse as a member of the pension plan. The non-member spouse's pension would be based on a proportionate share of the member spouse's pension valued as of the date of marriage breakdown. The proportionate share is based on a fraction of X/Y: "X" being the length of pension membership during the marriage, and "Y" being the total length of pension membership until marriage breakdown.¹³⁹

The key feature of a separate pension is that it is independent of the member spouse.¹⁴⁰ The separate pension is based on the non-member spouse's life expectancy and is governed by elections made under the pension plan by the non-member spouse.¹⁴¹ To avoid prejudice to the plan and the imposition of higher costs on it than would have been the case had the member retained the entire pension, the separate pension cannot begin before the member spouse is eligible to retire.¹⁴² The actuarial value of the separate pension is the same as "the actuarial value of the non-employee spouse's fractional share of the pension which the employee spouse could, if the matrimonial property had not been divided, have claimed at the time the claim is made by the non-employee spouse".¹⁴³

Where a pension is divided by the provision of a separate pension, a pre-retirement death benefit should, in the Alberta Institute's view, be shared because it is paid in lieu of the separate pension which will not be paid in the event of the member's death. However, where a member spouse dies after retirement, the Alberta Institute did not believe that the member's death benefit should be shared because the separate pension "represents the whole of the non-employee spouse's share of the pension benefit".¹⁴⁴

(iv) Division of Proceeds

Under a division of proceeds, the non-member spouse is entitled to share in the dollar amount that is paid under the pension plan to the member spouse.¹⁴⁵ There are two forms of division of proceeds discussed by the Alberta Institute.

¹³⁹ *Ibid.*, at 25.

¹⁴⁰ *Ibid.*, at 45.

¹⁴¹ *Ibid.*, at 24.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, at 33.

¹⁴⁵ *Ibid.*, at 28.

One is division by the plan administrator. The other is division by the member spouse. Under the first method, the plan administrator is required to divide the proceeds payable under the plan to the non-member spouse when the member spouse chooses to retire. This method is similar to the "if and when" orders or agreements available under the Ontario *Pension Benefits Act*.¹⁴⁶ Under the second method, the proceeds of the pension are divided by the member spouse. The member holds the non-member spouse's share of the pension interest in trust for the benefit of the non-member spouse.¹⁴⁷

In both cases the Alberta Institute recommends that the member spouse obtain the approval of the non-member spouse or the court before an election with respect to the different kinds of pensions payable, for example, a joint-and-survivor pension or a pension with a guaranteed term.¹⁴⁸ The Alberta Institute felt that payments to the non-member spouse should commence on the actual retirement date of the member spouse unless a court orders otherwise.¹⁴⁹ Where the member dies before the commencement of the pension and a death benefit is provided in the form of a lump sum or an annuity, the Alberta Institute suggested that that benefit be shared with the non-member spouse. However, the Alberta Institute did not believe that an additional death benefit, which arises because the member leaves a child or a later spouse, should be shared.¹⁵⁰

The Alberta Institute recommended that the death of the non-member spouse should not terminate the obligation to divide pension proceeds. Because the non-member spouse acquires a vested right to receive a share of the proceeds of the pension, the death of the non-member spouse "should no more deprive him or her of the share of the proceeds than it would deprive him or her of, say, an interest in a house or other property".¹⁵¹ The Alberta Institute suggested that the proceeds be payable to the estate or the beneficiaries of the non-member spouse.

The Alberta Institute identified a number of problems with the division-of-proceeds option. The first problem is that a division of proceeds ties the parties together, and the payment to the non-member spouse depends on a number of factors personal to the member spouse, such as his or her life expectancy or retirement date. The second problem concerns the potential for conflict between the interests of the member and the non-member spouse over choices that the

¹⁴⁶ *Supra*, note 5.

¹⁴⁷ Alta. Report No. 48, *supra*, note 3, at 28-29.

¹⁴⁸ *Ibid.*, at 30.

¹⁴⁹ *Ibid.*, at 31.

¹⁵⁰ *Ibid.*, at 32.

¹⁵¹ *Ibid.*, at 36.

member has under the plan with respect to the retirement date and other terms of the pension.¹⁵² The Alberta Institute favoured division by the pension plan administrator as being more beneficial to the non-member spouse because it avoided continued contact and, possibly, conflict between the parties.¹⁵³

The Alberta Institute recommended that the division of the proceeds of a pension plan should be available only where no other method of division is practicable and equitable. The example given by the Institute is the case of the division of a matured pension—that is, where at the time of division the member spouse is already receiving payments under the plan. At this point, the pension rights of the member spouse have crystallized, and the pension can no longer be divided easily by valuation and division.¹⁵⁴

(c) LAW REFORM COMMISSION OF BRITISH COLUMBIA

In 1990, the Law Reform Commission of British Columbia (the British Columbia Commission) published a working paper on the division of pensions on marriage breakdown.¹⁵⁵ The working paper examined the law governing the division of pensions in British Columbia and considered the need and options for changing the law. The working paper was designed to generate advice, comments, and criticism. It was followed in 1992 by a Commission report on the division of pensions.¹⁵⁶ In this report, the British Columbia Commission made a number of detailed recommendations for reform. Legislation closely based on the British Columbia Commission's proposals was passed by the British Columbia legislature in 1994,¹⁵⁷ but is not yet in force.

(i) Proposals for Reform

At the time when the British Columbia report was being prepared, pension division for family law purposes was typically effected through spousal "if and

¹⁵² *Ibid.*, at 45-46.

¹⁵³ *Ibid.*, at 47.

¹⁵⁴ *Ibid.*, at 46-47.

¹⁵⁵ Law Reform Commission of British Columbia, *Working Paper on Division of Pensions on marriage Breakdown* (Working Paper No. 65) (Vancouver: Ministry of Attorney General, December 1990) (hereinafter referred to as "B.C. Working Paper No. 65").

¹⁵⁶ B.C. Report No. 123, *supra*, note 2.

¹⁵⁷ *Family Relations Amendment Act, 1994*, *supra*, note 14.

when” agreements or orders, or valuation and lump-sum payments.¹⁵⁸ Both the British Columbia working paper and the British Columbia report identified the major problems associated with these methods—neither method is enforceable against the plan itself and neither involves the plan administrator. As noted earlier, spousal “if and when” arrangements require ongoing cooperation between the spouses and a continuing relationship of economic interdependence. Lump-sum cash settlements pose difficulties because the member spouse frequently lacks sufficient assets to satisfy the claim. For these reasons, the British Columbia report endorsed the direct involvement of the plan administrator in devising a scheme of pension division.¹⁵⁹

The British Columbia Commission based its proposals on the following general principles:¹⁶⁰

1. Plan involvement is a necessary feature of pension division.
2. Pension division legislation should ensure that the value payable to the spouse and member under a divided pension does not exceed the value that would have been payable to the member if the pension had remained intact.
3. Pension division legislation should require the spouse and member to pay a prescribed amount to offset the costs plans will incur in administering a divided pension.
4. Pension division legislation should provide a streamlined, unadorned pension division model, to minimize the administrative demands on plans while continuing to protect the interests of the spouse and member.

....

5. As a usual rule, a pension in a local unmatured defined benefit plan should be divided by a deferred account split when the member retires.
6. A spouse who wishes to have a pension in a local defined benefit plan begin before the member decides to retire, should be able to elect to have a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse.

¹⁵⁸ See, for example, B.C. Report No. 123, *supra*, note 2, at 6-7.

¹⁵⁹ The B.C. Report No. 123, *ibid.*, at 3-4, considered the passage of the *Pension Benefits Standards Act*, *supra*, note 11, which came into force in January 1993, and noted that although this legislation seems to contemplate the involvement of plan administrators, it is not clear that this legislation will permit the courts to make orders binding on plans. The B.C. Report No. 123, at 4, concluded that further legislative change is essential.

¹⁶⁰ B.C. Report No. 123, *supra*, note 2, at 30, 40.

7. The commuted value under Principle 6 should be determined as of the date selected by the spouse for the transfer, as though the member had left employment on that date and requested a transfer of the pension entitlement under the *Pension Benefits Standards Act*.
8. The transfer under Principle 6 should be governed by the same rules which govern the transfer of commuted value of a pension from a plan to the credit of a member, under the *Pension Benefits Standards Act*.
9. The transfer under Principle 6 should not be available any earlier than the date the member first becomes entitled to elect to retire and receive pension benefits.

The British Columbia report recommended different methods for dividing different types of pensions: unmatured pensions in defined benefit plans, matured pensions in all types of plans, and unmatured pensions in defined contribution plans.¹⁶¹ The British Columbia report recommended that the pension division legislation take the form of an amendment to the *Family Relations Act*,¹⁶² not to the *Pension Benefits Standards Act*.

Although the proposed legislation sets out specific schemes for different kinds of pension plans, the proposals are not mandatory and the parties have a choice between pension division at source or a valuation of the pension and a cash "compensation payment". The British Columbia proposals also provide a measure of flexibility to the parties in determining the share of the pension that the non-member is entitled to,¹⁶³ providing the member spouse retains at least one-half of the value of the pension or the benefits paid under the pension.¹⁶⁴

¹⁶¹ *Ibid.*, at 9-10. The report also considered extraprovincial plans that are not subject to a local court's order. In s. 55.6 of the proposed legislation, the report proposed that pension division be achieved by a benefit split (or "if and when" order) where the member spouse is required to hold a share of the payments under the pension plan in trust for the non-member spouse: *ibid.*, at 85. It is not possible to involve the plan administrator in this benefit split, as the plan does not fall within the provincial court's jurisdiction.

The report also considered proposals for plans that have features of both a defined contribution plan and a defined benefit plan, called "hybrid" pension plans: see *ibid.*, s. 55.14 of the proposed legislation, at 92.

¹⁶² *Supra*, note 82. See B.C. Report No. 123, *supra*, note 2, s. 2 of the proposed legislation, at 69.

¹⁶³ *Ibid.*, s. 55.10(1) of the proposed legislation, at 89-90.

¹⁶⁴ The British Columbia Commission's formulation of the fit-percent rule concerns fifty percent of the retirement value of the pension and not the value at the date of marriage breakdown. If the member spouse has been a member of the plan for a period of time longer than the marriage, one-half of the value of the pension benefits acquired during marriage will be less than one-half of the total value of the pension benefits accumulated. The member spouse

The legislation proposed by the British Columbia Commission provides several mechanisms, as set out below in sections (ii) through (iv), to divide pensions at source in British Columbia.

(ii) Unmatured Pensions in Defined Contribution Plans

The British Columbia report noted that the value of an unmatured pension in a defined contribution plan is easy to determine because it consists only of contributions to, and proceeds from the investments of, the account.¹⁶⁵ The method of pension division proposed by the British Columbia Commission is to transfer a lump-sum amount representing one-half of the value of the employer and employee contributions during the marriage and related "net investment returns" to another pension vehicle for the benefit of the non-member spouse.¹⁶⁶ "Net investment returns" is a defined term and means "interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings".¹⁶⁷ The proposed legislation provides that the non-member spouse is entitled to have a portion of the member spouse's account balance transferred from the plan to another pension, an RRSP, an insurance company to purchase a deferred or immediate pension, or a different account in the same plan.¹⁶⁸

(iii) Matured Pensions in Defined Contribution Plans

In the case of a defined contribution plan where the pension payments have commenced, the British Columbia report took the view that a "benefit split" is most appropriate.¹⁶⁹ A benefit split involves the pension plan administrator dividing the payment stream of the pension. The British Columbia Commission was reluctant in these circumstances to upset the existing pension arrangements.

is only required to retain one-half of the total value of the pension. Consequently, as part of an overall property settlement, in some cases a member spouse may convey more than one-half of the value of the pension benefits acquired during the marriage to the non-member spouse.

¹⁶⁵ B.C. Report No. 123, *supra*, note 2, at 9-10.

¹⁶⁶ *Ibid.*, s. 55.4 of the proposed legislation, at 82, and Regulation 5 of the proposed legislation, at 98.

¹⁶⁷ *Ibid.*, s. 55.1, of the proposed legislation, at 74.

¹⁶⁸ *Ibid.*, Regulation 9 of the proposed legislation, at 103.

¹⁶⁹ *Ibid.*, at 56. This recommendation of the British Columbia Commission with respect to the division of matured pensions is consistent with that in Alta. Report No. 48, *supra*, note 3.

All elections will have been made, including, for example, the selection of a joint-and-survivor pension.¹⁷⁰

Accordingly, the proposed legislation provides that, with respect to matured pensions, the non-member spouse will become a limited member of the plan and be entitled to receive a "proportionate share of the benefits paid under the pension".¹⁷¹ The proportionate share is determined as a ratio of time periods, namely the length of the marriage divided by the length of membership in the plan.¹⁷² The non-member spouse is entitled to one-half of this amount. For example, if the marriage lasted five years, and the member spouse was a member of the plan for ten years, the ratio is 1:2. The non-member spouse is entitled to one-half of this amount, or one-quarter of the value of the payments under the pension plan.

In the event of a benefit split, the non-member spouse is made a limited member of the plan to provide him or her with greater security. According to the proposed legislation, a limited member is entitled to receive direct payment of a proportionate share of the benefits paid under the pension until the death of the non-member spouse or the termination of the plan, whichever occurs first.¹⁷³ The plan under the British Columbia proposals is authorized to release to the limited member all relevant information about the plan, including valuation information and notice of any transaction or event affecting the pension.¹⁷⁴

(iv) Unmatured Pensions in Defined Benefit Plans

The British Columbia Commission proposed that the parties to a marriage breakdown have the option of a "separate pension" where the pension being divided is an unmatured defined benefit plan.¹⁷⁵ Where the parties agree to settle a pension asset through the option of a separate pension, the non-member spouse attains "limited member" status under the British Columbia proposals and is required to wait until the member retires before he or she receives a share of the pension asset administered by the plan. The separate pension is available only

¹⁷⁰ B.C. Report No. 123, *supra*, note 2, at 87-88.

¹⁷¹ *Ibid.*, s. 55.8(1) of the proposed legislation, at 87.

¹⁷² *Ibid.*, Regulation 2 of the proposed legislation, at 96.

¹⁷³ *Ibid.*, s. 55.3 of the proposed legislation, at 80, and s. 55.8(1) of the proposed legislation, at 87.

¹⁷⁴ *Ibid.*, s. 55.12 of the proposed legislation, at 91. See, also, *ibid.*, Regulation 12 of the proposed legislation, at 105.

¹⁷⁵ *Ibid.*, s. 55.5 of the proposed legislation, at 82-84.

where the limited member is willing to wait until the member retires before receiving his or her proportionate share of the pension benefit. If the limited member wishes to take advantage of an earlier retirement date under the plan, the limited member has an entitlement determined according to the “deferred termination method”:¹⁷⁶

The theoretical structure of this model is that the spouse has a continuing property interest in the member’s pension. Consequently, there is no reason why the spouse cannot wait to have the share paid out. Since the value of pension entitlement for particular years often changes over time—either the benefit formula is adjusted or it is determined by the member’s salary which typically increases—the spouse would be wise to wait for the pension to come close to its maximum value before requesting transfer of the share.

Under the British Columbia proposals, where the limited member wishes to take advantage of an early retirement date and the member spouse does not, the limited member is restricted to a transfer of his or her proportionate share out of the pension to another pension vehicle.¹⁷⁷ Once this election is made, the plan is required to transfer to the credit of the non-member spouse in another plan or pension vehicle¹⁷⁸ a proportionate share of the commuted value of the member’s pension, calculated as though the member had terminated membership on the early retirement date selected by the non-member spouse.¹⁷⁹ Because the non-

¹⁷⁶ *Ibid.*, at 38, n. 39.

¹⁷⁷ *Ibid.*, s. 55.5(a) of the proposed legislation, at 83, and Regulation 9 of the proposed legislation, at 103. The spouse is designated a “limited member” of the plan, pursuant to Regulation 6 of the proposed legislation (*ibid.*, at 99), until the time at which the deferred termination option is selected by the non-member spouse and the spouse’s share has been completely satisfied by a transfer from the plan of a share of the pension. This provides the non-member spouse with certain rights to information about the plan, including the date of the member’s retirement or death: *ibid.*, Regulation 12(1) of the proposed legislation, at 105.

In the event the member spouse dies before a limited member receives any share of the pension, under s. 55.7(1) of the proposed legislation (*ibid.*, at 86), the limited member is entitled only to a proportionate share of any pre-retirement survivor benefit payable under the member’s pension.

Once the limited member has received the commuted value of a share of the pension on deferred termination, that spouse ceases to be a limited member of the plan: *ibid.*, s. 55.3(4) of the proposed legislation, at 81.

¹⁷⁸ *Ibid.*, Regulation 9 of the proposed legislation, at 103.

¹⁷⁹ The “commuted value” of the pension is determined according to the termination method of valuation, that is, it is determined as if the member spouse had terminated employment and applied to have the value of the pension transferred to another plan. The proposed legislation incorporates the definition of “commuted value” included in the British Columbia *Pension Benefits Standards Act*, *supra*, note 11, s. 1 (expanded on in Pension Benefits Standards Regulations, B.C. Reg. 433/93, s. 11); B.C. Report No. 123, *supra*, note 2, s. 55.1 “commuted value” of the proposed legislation, at 71.

member spouse can defer the valuation until close to the actual retirement date of the member spouse, the non-member spouse benefits from almost all of the increase in the value of the pension following the date of marriage breakdown. The British Columbia Commission viewed this approach as being advantageous because it does not prejudice the plan, because there is no guesswork in the calculation, and because it is based on a calculation familiar to the plan.¹⁸⁰

Where the limited member decides to wait until the member retires before receiving a share of the pension asset, the limited member is entitled to a separate pension.¹⁸¹ Under this option, the plan administrator is required to set up a separate pension for the limited member consisting of his or her share of the member's pension on the member's retirement.¹⁸² The limited member's separate pension must be based on a proportionate share of the pension that the member would have received.¹⁸³ The spouse receives a proportionate share of whatever benefits would have been paid to the member. "Proportionate share" is defined in the British Columbia proposed legislation.¹⁸⁴ The basis of the separate pension is a *Rutherford*-type formula.¹⁸⁵ Because the non-member spouse acquires a separate pension at the time of the member's retirement, decisions about the

The non-member spouse's "proportionate" share of the commuted value is determined as a ratio of time periods, namely the length of the marriage divided by the length of the membership in the plan. The non-member spouse is entitled to one-half of this amount: *ibid.*, Regulation 2 of the proposed legislation, at 96.

¹⁸⁰ *Ibid.*, at 38.

¹⁸¹ *Ibid.*, ss. 55.1, 55.5(b) of the proposed legislation, at 76, 84 respectively.

¹⁸² See B.C. Working Paper No. 65, *supra*, note 155, at 42-44. Prior to the date of retirement, the non-member spouse can be designated a "limited member" of the plan pursuant to Regulation 6 of the proposed legislation: B.C. Report No. 123, *supra*, note 2, at 99. This provides the non-member spouse with certain rights to information about the plan, including the date of the member spouse's retirement or death: *ibid.*, Regulation 12 of the proposed legislation, at 105.

In the event the member spouse dies before retirement, under s. 55.7(1) of the proposed legislation (*ibid.*, at 86) the limited member is entitled only to a proportionate share of any pre-retirement survivor benefit payable under the member's pension.

¹⁸³ B.C. Report No. 123, *ibid.*, Regulation 3(b) of the proposed legislation, at 97. Again, the proportionate share is determined pursuant to Regulation 2 of the proposed legislation (*ibid.*, at 96), which provides that this share is determined as a ratio of time periods, namely the length of the marriage divided by the length of membership in the plan. The non-member spouse is entitled to one-half of the amount.

¹⁸⁴ *Ibid.*, s. 55.1 of the proposed legislation, at 75, and Regulation 2 of the proposed legislation, at 96.

¹⁸⁵ See *Rutherford v. Rutherford* (1981), 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.). See, also, *infra*, ch. 7, note 65, for a discussion of this formula.

limited member's share of the pension, and the various elections to be made on retirement, can be made independently of the member spouse. Any interdependence between the spouses is effectively severed as of the date of retirement of the member spouse.

The British Columbia Commission did not recommend a transfer option at the time of marriage breakdown. As the British Columbia report noted, the commuted value of the pension benefit on the date of separation, calculated as if the non-member spouse had terminated employment on the valuation date, may significantly undervalue the non-member spouse's interest.¹⁸⁶ The value of some types of pensions, particularly pensions in final average earnings plans, usually increases substantially in the last years of membership. The commuted value of the pension on the date of separation may be low compared with the projected value of the pension at retirement. For this reason, in the case of an unmatured pension in a defined benefit plan, the British Columbia report did not recommend the option of a transfer of a portion of the pension valued at the date of marriage breakdown.

The transfer option developed by the British Columbia Commission provides for a transfer effective on the early retirement date to compensate for this problem. It was also designed to provide an independent early retirement option for the non-member spouse. The Commission believed that the non-member spouse should have the option of retiring on the early retirement date independently of the retirement date of the member.¹⁸⁷ However, the British Columbia Commission was also concerned that allowing the non-member spouse to retire before the actual retirement date of the member might negatively affect the plan:¹⁸⁸

A problem stems from the different financial positions of the member and the spouse just referred to. Because as a rule members do not take early retirement at the earliest available date, pensions are usually funded on the basis that members will retire at a later age. When a member does take early retirement, the pension may be supplemented to some degree by the plan.

A spouse has no salary to give up when "retiring" under the member's plan and so will elect to take retirement at the earliest possible time (at least at the earliest time a full pension becomes payable). Unless some adjustment is made to the limited

¹⁸⁶ B.C. Report No. 123, *supra*, note 2, at 34-35. See, also, B.C. Working Paper No. 65, *supra*, note 155, Appendix C, at 123-36.

¹⁸⁷ B.C. Working Paper No. 65, *ibid.*, at 61. The British Columbia Commission stated:

It is our tentative view that a spouse should be allowed to elect to take the pension at any time that it was open to the member to do so. [Footnote omitted]

¹⁸⁸ *Ibid.*, at 62 (footnote omitted).

member's pension, the cost to a plan (particularly after several pension divisions between members and their spouses) may be significant.

Therefore the solution proposed by the British Columbia Commission was to allow a transfer out of the pension plan on the early retirement date based on the commuted value of the pension as calculated at the normal retirement date.

6. PROPOSED REFORM IN ONTARIO: REPORT OF ONTARIO MINISTRY OF FINANCIAL INSTITUTIONS

In March 1989, the Ontario Ministry of Financial Institutions published a report¹⁸⁹ proposing fundamental reforms to the current provisions of the *Pension Benefits Act*¹⁹⁰ concerning "if and when" orders administered by pension plans. The current provisions of Ontario law prohibiting a transfer of a portion of the commuted value at the time of marriage breakdown were criticized by the report on the basis that, where the member spouse lacks sufficient assets to satisfy an equalization claim with respect to the pension benefits, the only option that may be available to the parties—an "if and when" order—is plainly unsatisfactory. As the report pointed out, there is no assurance that the non-member spouse will receive the benefits agreed on in the "if and when" arrangement because the non-member spouse's entitlement to receive a pension is contingent on the member reaching retirement.¹⁹¹

The second area of concern noted in the report was the fifty-percent rule. Under current legislation, the portion of pension benefits to which a spouse can become entitled is restricted to fifty percent of the value of the pension accrued during the marriage based on a termination approach. The report criticized this provision as unduly complicating the settlement process, restricting the parties' ability to enter into agreements that satisfy their particular needs, and leading to inequitable results, particularly for the non-member spouse. The report concluded that in most cases the fifty-percent rule would result in inequity because the

¹⁸⁹ *Supra*, note 4.

¹⁹⁰ *Supra*, note 5.

¹⁹¹ The Ontario Ministry of Financial Institutions, *supra*, note 4, at 82, noted as follows:

The spouse's entitlement is therefore at risk to the extent that the member may choose to work beyond normal retirement date, take any other action which may affect the timing of payment or the value of the benefits, such as early termination, or die before the benefits have been paid out of the pension. In addition, this approach tends to require that a long-term economic relationship be maintained between the spouses, so that 'finality' of relations may not be achieved at the date of settlement.

termination approach prescribed for determining violations of the fifty-percent rule does not adequately value the pension asset.¹⁹²

The report made two basic recommendations for reform. The first permits the actual division of pension benefits between spouses at the time of marriage breakdown.¹⁹³ The non-member spouse is considered to be a pension plan member who has terminated employment. As a terminated member, the non-member spouse has a variety of options. He or she can require the plan administrator to roll the commuted value of his or her share of the pension accrued during the marriage into another retirement vehicle, such as an RRSP; another pension plan if permitted by this other plan; or a deferred annuity. The non-member spouse also has the option of keeping the benefits in the same plan if the plan permits, and is then entitled to a deferred pension that commences at the earliest on his or her normal retirement date.¹⁹⁴

Under these proposals, a separation of the interests of the two spouses at the time of marriage breakdown is possible. The portion of the benefit transferred to the non-member spouse is not affected by the death or remarriage of the member, thereby providing substantially increased security to the non-member spouse. An immediate and final settlement of the non-member spouse's claim can also be effected. Unlike the current scheme of pension division under the Ontario *Pension Benefits Act*, the economic relationship between the spouses is terminated.

The second proposed reform is to eliminate the existing prohibition against allocating to the non-member spouse more than fifty percent of the value of the

¹⁹² The Ontario Ministry of Financial Institutions, *ibid.*, at 84, noted as follows:

The value of some types of pensions, notably pensions in final average plans, can increase substantially as the plan member nears the final few years of membership, an increase which applies retroactively to all accrued benefits. As a result, the value of the pension as determined at the date of the separation, (often referred to as the 'termination' valuation method), and hence the amount of the pension that can be shared between spouses in the settlement, may be fairly low in comparison with the projected value at retirement, adjusted to take into account the length of the marriage as a proportion of the number of years of plan membership (often referred to as the 'retirement' method of valuation). In effect, the value at the date of separation may not fairly represent the ultimate value of the pension. It may therefore be appropriate, in some circumstances, to permit the spouses to share more than 50% of the pension to compensate for the fact that the termination value may not be a true representation of the value of the pension to the member.

¹⁹³ *Ibid.*, at 88. The transfer of pension division has been adopted in a number of provincial and federal jurisdictions.

¹⁹⁴ *Ibid.*, at 88.

pension benefit accrued during the marriage.¹⁹⁵ Elimination of the fifty-percent rule would provide greater flexibility to the parties. In particular, the report noted that the parties would be entitled to assign a portion of the pension based on its value at the date of retirement if that was appropriate in the circumstances. Removal of the fifty-percent rule would also lower professional costs because it would “eliminate the need to ‘test’ settlements against the 50% share rule”.¹⁹⁶

7. CONCLUSION

Most Canadian jurisdictions provide some mechanism for dividing pensions at source on marriage breakdown. These schemes vary greatly. They include transfers out of the pension plan at the time of marriage breakdown, the provision of deferred pensions to non-member spouses, and the splitting of the pension payments received after retirement.

The reforms proposed by the Ontario Ministry of Financial Institutions involve a valuation of the pension at the date of marriage breakdown and a corresponding transfer of a portion of the commuted value to the benefit of the non-member spouse, or the creation of a separate account in the same pension plan at the time of marriage breakdown.

The Alberta Institute of Law Research and Reform suggested a number of options for pension division at source, which included a transfer out of the plan at the date of marriage breakdown, the provision of a deferred pension to the non-member spouse, and the splitting of the ultimate pension payment.

The Law Reform Commission of British Columbia recommended the adoption of a “separate pension”, which would be created at the retirement date of the member spouse. Thus, the non-member spouse would be able to share in the increase in the value of the pension following marriage breakdown.

The Ontario Law Reform Commission has found all these models and recommendations instructive in developing our own understanding of the pension division issue. Although we have not adopted in its entirety any one of these sets of proposals, we have relied on all of them in formulating our own proposals for pension division at source. Our proposals are set out in chapters 6 and 7 of this report.

¹⁹⁵ *Ibid.*, at 90.

¹⁹⁶ *Ibid.*

CHAPTER 5

PENSION VALUATION UNDER THE *FAMILY LAW ACT*: DEFINED BENEFIT PLANS

1. INTRODUCTION

The *Family Law Act*¹ requires that pensions be valued on marriage breakdown and that the value be settled through the equalization process. The *Family Law Act* does not, however, stipulate how that value is to be determined.² This has led to difficulties where the pension subject to valuation is a defined benefit plan. While the valuation of defined contribution plans is a relatively straightforward matter,³ the valuation of defined benefit plans is considerably

¹ R.S.O. 1990, c. F.3, ss. 4, 5.

² The *Pension Benefits Act*, R.S.O. 1990, c. P.8, does not prescribe a method to be used in the valuation of pensions for the purposes of determining a member's net family property under the *Family Law Act*, *supra*, note 1. However, with respect to the "fifty percent rule", s. 56 of the regulations under the *Pension Benefits Act*, R.R.O. 1990, Reg. 909, provides as follows:

56. For purposes of subsection 51(2) of the Act, the pension benefits accrued during the period a member had a spouse shall be determined as if the member terminated employment at the valuation date in accordance with the terms of the plan at that date and without consideration of future benefits, salary or changes to the plan but with consideration for the possibility of future vesting.

Some have interpreted s. 56 to suggest that Ontario legislation requires the termination method to be used in the valuation of pensions as family property under the *Family Law Act*. The regulation is, however, only used to determine the maximum amount of the pension benefits that an employer can pay to a non-member spouse to settle an equalization claim. Section 51 of the *Pension Benefits Act* provides that the equalization claim cannot be greater than fifty percent of the pension benefits accrued during the marriage, calculated as prescribed in the regulations. The regulations do not presume to establish any standard of valuation for the purposes of the *Family Law Act*.

³ The value of a defined contribution plan is the accumulated value or the "actual accumulation of the fund": Jack Patterson, *Pension Division and Valuation*[:] *Family Lawyers' Guide* (Aurora, Ont.: Canada Law Book, 1991), at 61. An actuarial value of defined contribution plans is inappropriate (*ibid.*):

more complex.⁴ It rests on certain assumptions concerning future events and contingencies. Because of the many factors involved in such calculations, valuations for the same plan can vary substantially, depending on the methods and assumptions on which they are based. Understandably, each party to a marriage breakdown seeks a valuation that will best serve his or her financial interests. Each spouse retains his or her lawyer to negotiate issues relating to pension valuation and, typically, each spouse engages his or her own actuary as well. When agreement cannot be reached, the result is often a lengthy and expensive judicial proceeding.⁵ The effect of the current system of pension valuation has been characterized as “rough justice” at best.⁶

In this chapter, the Commission makes a series of recommendations that attempt to clarify the law regarding the appropriate actuarial methods, principles, and assumptions to be used in valuing defined benefit plans for the purposes of determining an equalization entitlement under the *Family Law Act*. The Commission believes that standards for the valuation of defined benefit plans should be prescribed as a matter of law.⁷ A stipulated method of pension

You simply determine from the plan administrator the amount of the fund at the date of valuation and the amount of the fund at the date of marriage, and these values are used directly in the calculation of net family property.

⁴ Approximately sixty percent of public sector pension plans fall into the defined benefit plan category, as do approximately forty-two percent of private defined benefit plans. Ninety-one percent of all pension plan members in Canada belong to defined benefit plans. There are 8,284 defined benefit plans in Canada with 4,633,587 members. These represent 41.5 percent of all plans and 90.7 percent of all members of plans. There are 11,443 defined contribution plans (57.3 percent of all plans) with 430,561 members (8.4 percent of all members of plans). The percentages of plans and members do not add up to one hundred percent because certain plans not readily classified as either defined benefit or defined contribution plans are excluded: Statistics Canada, *Pension Plans in Canada—1990* (survey), Table 10, at 3.

⁵ Valuation costs vary from \$400 to \$1,000, but if actuaries must testify in court, the cost rises substantially and may be closer to the \$2,500-\$5,000 range: Law Reform Commission of British Columbia, *Working Paper on Division of Pensions on Marriage Breakdown* (Working Paper No. 65) (Vancouver: Ministry of Attorney General, December 1990), at 123 (hereinafter referred to as “B.C. Working Paper No. 65”).

⁶ *Ibid.*, at 124, quoting E.M. Roche, “Treatment of Pensions upon Marriage Breakdown in Canada: A Comparative Study” (1986-87), 1 Can. Fam. L.Q. 189, at 215.

⁷ The Alberta Institute of Law Research and Reform (now Alberta Law Reform Institute), in *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*, Report No. 48 (Edmonton: June 1986), at 57 (hereinafter referred to as “Alta. Report No. 48”), argued the need for legislation in this area:

valuation would reduce the expense, delay, and litigation arising from disputes concerning the proper valuation of pensions.

Legislation would eliminate the need for spouses on marriage breakdown to rely on the courts to resolve pension valuation issues.⁸ A legislated valuation process would provide certainty and reduce costs.⁹ The need for certainty in this area was emphasized by the Supreme Court of Canada in *Clarke v. Clarke*,¹⁰ where it quoted from the Nova Scotia Court of Appeal:¹¹

The legislative policy should be clearly expressed, preferably in pension legislation, so that spouses will know exactly what benefits they are entitled to in the event of a marriage breakdown.

Innocent bystanders must be protected against being prejudiced by lawsuits between spouses. Therefore, if there is to be a valuation and division, it must be on the basis of a valuation produced under a standardized procedure which will not involve pension plans and their administrators in litigation.

The Law Reform Commission of British Columbia recommended that a default method of valuation be provided for in regulations, but it was unwilling to recommend mandatory regulations for pension valuation: see *Report on the Division of Pensions on Marriage Breakdown*, Report No. 123 (Vancouver: Ministry of Attorney General, January 1992), at 106 (hereinafter referred to as "B.C. Report No. 123"). The proposed legislation set out in B.C. Report No. 123 is reproduced *infra*, Appendix D.

- ⁸ The Law Reform Commission of British Columbia, in its Report No. 123, *ibid.*, at 119, argued that the area of pension valuation is so complex that lawyers and judges sometimes have difficulty in coming to terms with it. The Commission cautioned against leaving valuation issues for the judiciary to decide:

It is the rare judge that will have an actuarial background, and pension valuation issues are extremely confusing for anyone without the requisite training. Finding inconsistent cases is not surprising. What is unexpected is to find people arguing that a discretionary regime should be left in the hands of people, who, by profession, are not trained to deal with the issues.

- ⁹ In a supplement to a submission of December 6, 1991, to the Canadian Bar Association — Ontario (December 16, 1992), at 6, the Pension and Benefits Law Section of the Canadian Bar Association — Ontario suggested that regulations dealing specifically with valuation would avoid unnecessary costs for the parties concerned.

- ¹⁰ [1990] 2 S.C.R. 795, 28 R.F.L. (3d) 113 (subsequent references are to 28 R.F.L. (3d)).

- ¹¹ *Ibid.*, at 127, reversing and quoting from (1986), 72 N.S.R. (2d) 387, at 395, 1 R.F.L. (3d) 29, at 44 (C.A.). See, also, Rutherford J. in *Best v. Best*, unreported (June 6, 1994, Ont. Gen. Div.) (see [1994] O.J. No. 1241).

The mandatory provisions for valuing pensions should be set out in regulations to the *Family Law Act*.¹² This will require an amendment to the *Family Law Act*, providing that the value of pension property is to be determined in accordance with prescribed regulations.

The Commission therefore recommends that the *Family Law Act* should be amended to provide that the valuation of defined benefit plans for the purposes of determining an equalization entitlement under section 5 of the Act be made in accordance with "Pension Valuation Regulations" promulgated under that Act.

2. CANADIAN INSTITUTE OF ACTUARIES' STANDARD OF PRACTICE

(a) INTRODUCTION

In determining appropriate valuation assumptions and principles to be used in the valuation of defined benefit plans, the Commission was greatly assisted by the 1993 guidelines prepared by the Canadian Institute of Actuaries (the CIA) in its *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*.¹³ The Standard of Practice deals with "economic and demographic assumptions to be used in the valuation of pension entitlements on marriage breakdown for the purposes of lump-sum equalization payments under provincial *Family Law Acts* or similar statutes, with the methods that may be employed for such valuations and with the content of actuarial reports on such valuations".¹⁴ The underlying principle of the Standard of Practice is that the reported present

¹² *Supra*, note 1.

¹³ Canadian Institute of Actuaries, *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments* (September 1, 1993) (hereinafter referred to as "CIA Standard of Practice"), reproduced *infra*, Appendix B. These guidelines were developed after a lengthy process that included exposure drafts being released to the actuarial profession in June 1988, November 1988, November 1992, and April 1993. During that time, there was extensive consultation with the actuarial profession: *Canadian Employment Benefits and Pension Guide Reports* (North York, Ont.: CCH, looseleaf), Vol. 2, ¶ 8155, at 5629 (hereinafter referred to as "CCH Guide").

¹⁴ CIA Standard of Practice, *supra*, note 13, at 2.

value of pensions given by the actuary should be determined in a manner that is equitable to both the plan member and the spouse of the plan member.¹⁵

The intention of the CIA in developing independent standards was to eliminate the need for two separate actuarial reports, thereby avoiding conflict between “duelling actuaries” and the possibility of litigation. The Standard of Practice specifies that actuarial reports “should be independent, regardless of whether the actuary has been engaged by the plan member ... or by the spouse of the plan member”.¹⁶ It addresses several major problems that have arisen in the pension valuation process and sets out guidelines for dealing with the following issues:¹⁷

- 1.1 Interest rates used to discount future payments (net interest rate for indexed pensions).
- 1.2 Salary increase assumption under retirement method.
- 1.3 Mortality assumption.
- 1.4 Retirement ages for which values are to be reported.
- 1.5 Compliance with prevailing local practice on legal issues.
- 1.6 Content of actuarial reports (e.g., disclosure of client relationships, disclosure of assumptions and methods, disclosure of plan information, statement of compliance).

The Standard of Practice, while binding on the actuarial professional to the extent permitted by legislation, is not mandatory for valuation purposes under the *Family Law Act*. In the Commission’s view, it would be useful to ensure that the Standard of Practice forms the basis of pension valuation in family law matters in Ontario, by promulgating regulations for valuing pensions on marriage breakdown under the *Family Law Act* that would require such valuations to be based on the Standard of Practice.

The Commission therefore recommends that the proposed Pension Valuation Regulations should prescribe a method for valuing defined benefit

¹⁵ *Ibid.*, at 1.

¹⁶ *Ibid.*

¹⁷ David A. Short, *Pension Valuation Issues* (June 18, 1993) (document prepared for the Ontario Law Reform Commission).

plans that is based on the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993 to the extent that a particular standard, method, or principle has been mandated by that Standard.

(b) ISSUES LEFT UNRESOLVED BY CIA STANDARD OF PRACTICE

There are a number of issues that the Standard of Practice does not settle. Areas of dispute remain that are likely to give rise to litigation. The approach taken in the Standard of Practice with respect to these matters is either to refer the actuary to the general law of the applicable province or to instruct the actuary to provide a range of figures that reflect differing assumptions and methods. In many cases, it will be appropriate for the actuary to provide two or three values accompanied by an explanation of what each of these values represents.

A number of the issues not addressed by the Standard of Practice are legal in the sense that the Standard of Practice does not offer a solution to them and they must be left to resolution by law. The legal issues left unresolved by the Standard of Practice include the following:¹⁸

- 2.1 Retirement or termination method.
- 2.2 Retirement age to be assumed (under termination method) or pension commencement age (under termination method).
- 2.3 Extent of recognition of benefits that were not vested on date of separation (primarily termination benefits and early retirement privileges).
- 2.4 Recognition of death benefits (spousal and non-spousal) in valuation.
- 2.5 Recognition of non-contractual inflation protection practices and other plan improvements.
- 2.6 Adjustment for value at date of marriage (pro-rata, value-added or value of increase in pension during marriage).
- 2.7 Issues related to adjustment for income tax, e.g.
 - 2.7.1 Whether to adjust at all?

¹⁸ *Ibid.*

- 2.7.2 Average or marginal tax rate?
- 2.7.3 Which year's tax regime to use (year of separation or current regime)?
- 2.7.4 Recognition of increase in tax arising from incomplete indexing of tax brackets and exemptions.
- 2.8 Recognition of post-separation events (e.g. change of employment, retirement or failure to retire when eligible, plan amendments).

The remainder of this chapter will consider these outstanding legal issues, and propose solutions to them that should be included in the proposed Pension Valuation Regulations.

3. POST-SEPARATION SALARY INCREASES AND PLAN IMPROVEMENTS: TERMINATION OR RETIREMENT METHOD

(a) INTRODUCTION

A defined benefit pension plan is a future and contingent asset, the value of which depends on a number of factors, including the possibility that the member may terminate employment before retirement and lose the benefit of future years of service and a higher salary. To calculate the value of the pension asset, the probable future income from the pension must first be determined. That amount is then capitalized to provide a lump sum that is actuarially equivalent to the present value of this future stream of income.¹⁹ In the case of a defined benefit

¹⁹ Patterson, *supra*, note 3, at 21-22, defines "present value" in the following terms:

The present-day capitalized value is the amount of the fund that must be invested at the valuation date so that, after allowing for income in the form of interest on both the original fund and on reinvestment of income, the total accumulated fund is just adequate to provide such benefits, including any applicable indexing, taking into consideration the fact that the recipient of the pension must survive to receive any individual payment.

See, also, Dona L. Campbell and Miller Thomson, "Consideration of Retirement Benefits on Marital Breakdown", in *Pensions: Advising Clients in a Changing Environment* (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 1991) (paper presented at program held in Toronto, October 30, 1991), at C-12, where "present value" is explained as follows:

The concept of 'present value' ... is most easily understood as the sum necessary as of the valuation date to fund payment at retirement of the accrued benefit. To calculate the present value for net family property purposes an actuary will calculate the lump sum, which if set aside on the valuation date, would accumulate sufficient interest as of the retirement date to produce the level of pension accrued during the marriage.

plan, the amount of this future income depends on the member's salary and the number of years of pensionable service. The retirement and termination methods are two approaches to the calculation of the amount of the future income stream.

The termination method calculates the value of the probable future income stream as if the member had terminated employment on the valuation date (the date of separation). Only the member's actual salary and years of pensionable service, as of the valuation date, are used to calculate the pension benefits to which the member would be entitled on retirement. Under the termination method, future contingencies, such as salary increases, years of service, and plan improvements, are generally not taken into account. Practically speaking, an application of the termination method means that the value of the pension is crystallized as of the date of separation, because the future income stream is based on the amount that would be payable to the plan member at retirement age if the member terminated employment on that date.

The retirement method, by contrast, calculates the value of the future income stream based on the assumption that the member's employment will continue until retirement. The retirement approach values the pension benefit by using estimates of the likely future earnings of the member until an assumed retirement date.²⁰ The future income stream is based on an estimate of the member's projected salary, benefits, and service at the assumed retirement date. The retirement method assumes that the member's pension benefit continues to accrue until retirement.

While the retirement method is potentially applicable to all defined benefit plans, it is most relevant to the determination of the value of final average earnings plans ("final or best average").²¹ In final average earnings plans, pensions are based on the average of the highest consecutive three or five years' earnings (which are usually the last years prior to retirement) and on years of

²⁰ Patterson, *supra*, note 3, at 167. Patterson terms this the "speculative retirement method", which he defines in the following terms:

The member is assumed to continue in employment to the retirement age chosen, and an attempt is made to estimate the future pension entitlement at that date. This entitlement is estimated by speculating on future increases in the CPI [Consumer Price Index], by assuming that the pension entitlement at the valuation date will grow by the retirement age chosen to reflect such increase in the CPI, and possibly by considering the effect of future promotions and other career moves.

²¹ Twenty-one percent (4,190) of all pension plans in Canada are final or best average plans, with 59.8 percent (3,055,546) of all pension plan members in Canada belonging to them: Statistics Canada, *supra*, note 4, at 3.

service or employment.²² An application of the retirement method to the valuation of final average earnings plans takes into consideration salary increases in the final or best years, as well as total years of pensionable service from the time membership commences until retirement.

(b) CIA STANDARD OF PRACTICE

The CIA Standard of Practice sets out standards for calculating both termination and retirement methods of valuation without prescribing one or the other. It defines the retirement method as “a projected accrued benefit valuation method, with salary projection where appropriate”.²³ The termination method is defined as “an unprojected accrued benefit valuation method. No increase in accrued benefits shall be reflected, except to the extent such increases are provided to deferred vested pension plan members.”²⁴

The Standard of Practice distinguishes the termination method it adopts from one where “literal presumption of termination of membership is mandated”.²⁵ It states that the latter is applicable only if provincial legislation imposes a literal termination approach. The Standard of Practice specifies the following with respect to the treatment of post-separation salary increases:²⁶

Under the termination method, future salary increases are disregarded. Under the retirement method, assumed future salary increases should be consistent with applicable interest rates and other economic assumptions.

The Standard of Practice has attempted to devise a fairer middle ground for the calculation of both the retirement and the termination approaches.²⁷

For both the retirement method and the termination method, future benefit accruals and possible (or known, with the benefit of hindsight) plan improvements are disregarded. Literal termination of employment or membership is not contemplated.

²² Patterson, *supra*, note 3, at 12.

²³ CIA Standard of Practice, *supra*, note 13, at 3.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 1.

²⁶ *Ibid.*, at 7.

²⁷ *Ibid.*, at 3.

Accrued benefit enhancements and grow-in ancillary benefits (such as the right to unreduced early retirement subject to total age/service combinations, and/or bridging benefits), contingent only upon future service, to the extent accrued at the valuation date, must specifically be addressed by the actuary.

The phrase 'must specifically be addressed' means that the actuary must present a separately identified value of such benefits, without any discount for possible future forfeiture.

The Standard of Practice provides for the recognition of post-separation plan improvements where they are known to the actuary:²⁸

Where the actuary is aware that a valuation made as of a date slightly earlier or later than the valuation date would result in a materially different value, due to the design of the plan, the timing of a plan amendment, or circumstances of the plan member, the actuary should disclose this fact.

Similarly, where the actuary is aware of a fact that may negatively affect the value of the pension, the actuary is required to disclose that fact:²⁹

The reported value should not be reduced on account of the pension plan not being fully funded. If the actuary is aware of extraordinary circumstances wherein the pension plan has defaulted or may reasonably be expected to default upon pension promises or expectations, the actuary should disclose such awareness, and may suggest an appropriate reduction.

²⁸ *Ibid.*, at 4.

²⁹ *Ibid.*

(c) CURRENT LAW IN ONTARIO

A number of cases in Ontario have dealt with the appropriateness of the termination and retirement approaches to the inclusion of post-separation salary increases and plan improvements in pension valuation. The case law generally supports the termination approach. The rationale of the Ontario courts in preferring the termination method was set out in *Humphreys v. Humphreys*³⁰ by Galligan J.:

I have no hesitation in concluding that the 'termination method' is the more appropriate method to be used in this type of case. I do so for two main reasons. In the first place, it seems to me that it is consonant with the general scheme of the Act that assets be valued as of the valuation date. Apart from support considerations, it does not appear to me to be consistent with either the letter or the spirit of Pt. I of the Act to take into account the fruits of a spouse's labour after valuation date in valuing assets. The second reason is that the 'termination method' is less speculative than the 'retirement method'. The latter makes assumptions that may be incorrect when it assumes continued employment, salary increases and the amounts thereof.

In *Humphreys v. Humphreys*, the actuary retained by the husband to value his pension adopted a termination method and produced a value of \$83,000. The wife's actuary used a retirement method and produced a value of \$103,000. The valuation produced by the wife's actuary assumed that the husband would continue his employment until retirement and would receive regular increases in salary during that period. Galligan J. rejected the wife's actuarial valuation and the retirement method, noting that the actuarial assumptions made under the retirement method assumed salary increases after the valuation date that were higher than those that actually occurred. This was seen as evidence of the inaccuracy of the retirement method of valuation.³¹

³⁰ (1987), 7 R.F.L. (3d) 113 (Ont. H.C.J.), at 121. See, also, *Rickett v. Rickett* (1990), 72 O.R. (2d) 321, 25 R.F.L. (3d) 188 (H.C.J.), additional reasons at 71 D.L.R. (4th) 734 (H.C.J.) (subsequent references are to 72 O.R. (2d)); *Marsham v. Marsham* (1987), 59 O.R. (2d) 609, 7 R.F.L. (3d) 1 (H.C.J.) (subsequent references are to 59 O.R. (2d)); *Aylsworth v. Aylsworth* (1987), 9 R.F.L. (3d) 105 (Ont. H.C.J.); *Miller v. Miller* (1987), 8 R.F.L. (3d) 113 (Ont. Dist. Ct.); *Thompson v. Thompson* (1987), 62 O.R. (2d) 425 (S.C.); *Davies v. Davies* (1988), 13 R.F.L. (3d) 103 (Ont. H.C.J.); *Gasparetto v. Gasparetto* (1988), 15 R.F.L. (3d) 401 (Ont. H.C.J.); *Post v. Post*, unreported (March 16, 1989, Ont. Dist. Ct.), summarized at [1989] W.D.F.L. 831; and *Weaver v. Weaver* (1991), 32 R.F.L. (3d) 447 (Ont. Gen. Div.).

³¹ *Humphreys v. Humphreys*, *supra*, note 30, at 120-21.

The courts in other Ontario cases have also adopted the termination method and excluded post-separation salary increases from the determination of the present value of a pension. For example, Osborne J. refused to consider post-separation salary increases in *Hilderley v. Hilderley*.³² In coming to this decision, Osborne J. quoted the following passage:³³

Under this method a non-member spouse would share in pension accruals earned outside the period of marriage based upon escalating salary levels to retirement age. Moreover, these accruals may in fact never be earned where for example the particular spouse were to terminate employment prior to retirement age.

A similar application of the termination method to the consideration of post-separation plan improvements occurred in *Paterson v. Paterson*,³⁴ where changes in the terms of the husband's pension after the date of separation substantially increased the value of the pension. In that case, the right to retire at the age of sixty-two with an unreduced pension was introduced into the pension plan after the date of separation. Coe J. decided that the post-separation change in pension plan terms affecting value should not be taken into consideration.³⁵

In *Blais v. Blais*,³⁶ Loukidelis J. applied a termination approach to the valuation of a pension where there were post-separation benefit accruals and plan improvements. At the time of marriage breakdown, the husband was thirteen months away from thirty years of service. His twenty-nine years of plan membership on the valuation date (February 1985) entitled him to \$551 a month at the age of sixty-five. However, his pension would have been \$950 a month once he reached the thirty-year mark. As a result of a new contract in 1988, his pension was increased to \$1,376 and would continue to rise, reaching \$1,500 in June 1990. The husband actually retired on a pension of \$832 a month in 1988. Loukidelis J., in valuing the pension at \$551 a month, rejected the wife's argument that these events, even though they followed separation, should be included in the valuation because "they were part of a continuum of upward

³² (1989), 21 R.F.L. (3d) 383 (Ont. H.C.J.).

³³ *Ibid.*, at 391.

³⁴ Unreported (November 28, 1991, Ont. Gen. Div.).

³⁵ *Ibid.*, at 3.

³⁶ (1992), 38 R.F.L. (3d) 256 (Ont. Gen. Div.).

progress in labour's gains from the company and the building of the years of service accrued during marriage".³⁷

Another case that considered the relevance of post-separation events in the valuation of pension assets was *Weise v. Weise*.³⁸ In that case, Granger J. was willing to consider a post-separation plan amendment in valuing the husband's pension. The amendment removed a thirty-five-year cap on the accumulation of pension benefits. It was the husband's evidence that, as a result of the amendment to the pension plan, he would continue to work until the age of sixty-five. Granger J. accepted the husband's evidence and determined that, as a result of the amendment, the economic climate in Ontario, and the financial effects of marriage breakdown, the husband would not avail himself of his early retirement benefit (with a pension value of \$230,476), and valued his pension at \$120,212.

The reluctance of the judiciary to accept the retirement approach to the inclusion of post-separation pension accruals can be seen in *Salib v. Cross*.³⁹ There, Chapnik J. suggested a "deemed termination of employment" method for valuing pensions:⁴⁰

In my view, recent events, including the social contract with government employees, have validated the reasoning of Granger J. in adopting the termination approach to the valuation of pension benefits. The hybrid method of valuation depends upon certain probabilities and assumptions which cannot now, with any degree of certainty, be made.

... the termination method of valuation appears to me to be a much fairer approach to this issue. In my opinion, that method is consistent with both the intent of the Act and the regulations under the *Pension Benefits Act, 1987*, in providing equalization of what was earned and accrued prior to the date of separation.

The law in Ontario with respect to the appropriateness of the termination approach seems to be so settled that in a recent case, *Levac-Vicev v. Vicev*,⁴¹ both actuaries used the termination method and assumed that the wife, who was a member of the Teachers' Superannuation Fund, would terminate her employment

³⁷ *Ibid.*, at 262.

³⁸ (1992), 12 O.R. (3d) 492, 44 R.F.L. (3d) 22 (Gen. Div.) (subsequent references are to 12 O.R. (3d)).

³⁹ (1993), 15 O.R. (3d) 521 (Gen. Div.).

⁴⁰ *Ibid.*, at 533.

⁴¹ Unreported (January 11, 1994, Ont. Gen. Div.) (see [1994] O.J. 17).

on the date of separation, and included no benefits accruing after that date in the pension valuation.

(d) CURRENT LAW IN OTHER CANADIAN JURISDICTIONS

Other Canadian jurisdictions have adopted a variety of approaches to the inclusion of post-separation salary increases and plan improvements in pension valuation. In Saskatchewan, both the retirement and termination methods have been sanctioned by the courts.⁴² For example, in *Lock v. Lock*,⁴³ the termination method was used and only benefits accrued at the date of adjudication were valued. In another case, *Harrop v. Harrop*,⁴⁴ the Court adopted a retirement approach:⁴⁵

It appears to me that if the time left to retirement is five years or less, the fairest method to use would be the retirement method. Here the value of the asset would be near its optimum value, the bulk of the contributions would have been made during the marriage, the probability of the assumptions made actually happening would be greatest, the division between the parties of the value of the pension would be the fairest. On the other hand, if the time left to retirement is more than five years, the fairest method to use would be the termination method. Here the value of the asset would be near its actual value, only the contributions that were made during the marriage would be used in the calculation, and there would be no need to project into the future assumptions that may or may not happen.

A termination approach to pension valuation has also been applied in Alberta cases. In *Kopecky v. Kopecky*,⁴⁶ the Court valued the husband's pension for the purposes of a lump-sum payment on the principle that where a pension plan contains an option to withdraw contributions on termination of employment,

⁴² In Saskatchewan, *The Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001, s. 47(2), prescribes that for defined benefit plans, the pension's commuted value is to be calculated "as if the member or former member had terminated membership" on the date of separation. However, that only applies to calculations for pension division purposes under that Act. A division of family property that does not require the involvement of the plan is not subject to the Act's provisions.

⁴³ (1992), 39 R.F.L. (3d) 47, at 56, 99 Sask. R. 222, at 229 (Q.B.). See, also, *Richter v. Richter* (1991), 92 Sask. R. 57, at 63, 34 R.F.L. (3d) 387, at 395 (Q.B.).

⁴⁴ (1991), 37 R.F.L. (3d) 433, 95 Sask. R. 258 (Q.B.) (subsequent references are to 37 R.F.L.(3d)).

⁴⁵ *Ibid.*, at 439.

⁴⁶ (1983), 24 Alta. L.R. (2d) 79 (Q.B.).

the value of the plan is equal to the value of contributions.⁴⁷ A similar approach was taken in *Yeudall v. Yeudall*⁴⁸ with respect to an unvested pension. In that case, the husband was entitled before he was fifty-five years of age to elect, on termination of employment, to have his employee contributions paid to him. No employer contributions would be paid. The pension was valued at \$2,478.14 based on a contributions approach.

However, in *Strang v. Strang*,⁴⁹ the Supreme Court of Canada disapproved of the termination approach taken by the Alberta courts. In that case, the method of valuation of the pension in the lower court consisted of a division of the husband's contributions to the pension, and did not take into consideration the employer contributions. Cory J., speaking for the Court, criticized this approach, stating that it was not "an accurate means of assessing a pension's worth as a future asset" and that it did not "amount to a true division of the value of the pension as future property".⁵⁰

A termination approach to pension valuation has also been adopted in New Brunswick. For example, in *Saunders v. Saunders*,⁵¹ the Court based the valuation of a pension on the termination approach as set out in a 1988 Canadian Institute of Actuaries draft entitled *Exposure Draft on the Recommendations Concerning the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown*.⁵²

The British Columbia *Family Relations Act*⁵³ was amended in 1994 to provide that regulations may be made with respect to the method of calculating a compensation payment for the purposes of settling a pension property on

⁴⁷ *Ibid.*, at 81.

⁴⁸ (1988), 16 R.F.L. (3d) 344 (Alta. Q.B.), at 348.

⁴⁹ [1992] 2 S.C.R. 112, 39 R.F.L. (3d) 233 (subsequent references are to [1992] 2 S.C.R.).

⁵⁰ *Ibid.*, at 120. See, also, *Carrol v. Carrol* (1989), 24 R.F.L. (3d) 65, at 69, 102 A.R. 97, at 99 (Q.B.), where an actuarial valuation of a pension was accepted.

⁵¹ (1991), 39 R.F.L. (3d) 67, 122 N.B.R. (2d) 16 (Q.B.) (subsequent references are to 39 R.F.L. (3d)). See, also, *Belyea v. Belyea* (1990), 30 R.F.L. (3d) 407, at 417, 111 N.B.R. (2d) 300, at 315-16 (Q.B.).

⁵² *Saunders v. Saunders*, *supra*, note 51, at 72.

⁵³ R.S.B.C. 1979, c. 121, as am. by S.B.C. 1994, c. 6. The 1994 amendments are to come into force by regulation of the Lieutenant Governor-in-Council.

marriage breakdown.⁵⁴ Compensation payments must be calculated in accordance with the regulations unless the parties otherwise agree or the court otherwise orders.⁵⁵ No regulations have yet been promulgated. In all likelihood, the regulations will reflect a retirement approach, as this was the recommendation of the Law Reform Commission of British Columbia in its 1992 *Report on the Division of Pensions on Marriage Breakdown*,⁵⁶ on which the 1994 legislation is based.

Judicial decisions in British Columbia prior to the introduction of the new provisions offered some support for a termination approach. In *Stokes v. Stokes*,⁵⁷ the Court of Appeal ordered that a termination approach be used in the valuation of a pension where the spouse elected to take an immediate payout. In *Sehn v. Sehn*,⁵⁸ the Court of Appeal, after noting the existence of some confusion in British Columbia law, suggested that where the settlement option was an immediate payout, a termination approach should be used.⁵⁹ Although the British Columbia Court of Appeal's position has been that a termination approach is

⁵⁴ *Ibid.*, s. 55.97(g), as en. by S.B.C. 1994, c. 6, s. 8.

⁵⁵ *Ibid.*, s. 55.92(4), as en. by S.B.C. 1994, c. 6, s. 8.

⁵⁶ B.C. Report No. 123, *supra*, note 7.

⁵⁷ (1985), 46 R.F.L. (2d) 207 (B.C.C.A.).

⁵⁸ (1993), 46 R.F.L. (3d) 452, 83 B.C.L.R. (2d) 246 (C.A.) (subsequent references are to 46 R.F.L. (3d)).

⁵⁹ The British Columbia Court of Appeal, in *Sehn v. Sehn*, *ibid.*, at 459, referred to B.C. Report No. 123, *supra*, note 7, at 125-26, where the authors stated the following:

The confusion relating to valuation of compensation payments has spilled over into the field of benefit splits, possibly as a result of the *Mailhot dicta*, or the confusion between asset identification and valuation. For a benefit split, most cases simply come up with the fractional interest of the spouse. Essentially, they are identifying the portion that is the family asset. This fraction is applied when the pension is paid. It is, consequently, based on future pension values. To this extent, benefit split valuation and compensation payment valuation correspond.

There is no need to arrive at a present value calculation, since the spouse is going to wait for payment. Consequently, the remainder of the adjustments made in compensation payment cases are unnecessary for benefit splits. What do courts mean, then, when they talk about valuing a pension for a benefit split as of the triggering event? Possibly they are simply using the verb 'value' as a substitute for a phrase like 'identifying the portion of the pension that is a family asset.' But some courts are going further and expressly confining the benefit payment to current values.

appropriate where an immediate cash settlement is made, a retirement approach has been adopted in many instances.⁶⁰

The federal government has developed regulations for the valuation of pensions falling under the *Pension Benefits Division Act*.⁶¹ The method used in the Act has been characterized as a "modified retirement" method which recognizes some post-separation benefit accruals.⁶² Under section 15(1)(a) of the regulations, the "actuarial present value of a member's accrued pension benefits" is based on a number of actuarial assumptions which were "used in the preparation of the last actuarial valuation report of the member's pension plan laid before Parliament".⁶³ Unfortunately, this provision does not indicate whether post-separation salary increases are to be included in the valuation.⁶⁴ In any event, it should be noted that the regulations do not fix the value of the pension for family law valuation purposes, but only for the purposes of dividing pensions at source under the *Pension Benefits Division Act*.

Manitoba regulations prescribe the termination approach to pension valuation where a plan is divided pursuant to the provisions of *The Pension*

⁶⁰ Thus in *Thoburn v. Thoburn* (1993), 46 R.F.L. (3d) 265 (B.C.S.C.), at 268-69, Huddart J. made the following observation in this regard:

I think it fair to say that it has been common practice in British Columbia to include the present value of anticipated improvements to a pension plan in the valuation when a non-pensioned spouse chooses to release his or her interest in a pension to the pensioned spouse in exchange for some other property (a 'pension swap'). This has been called the 'retirement method' of valuation.

....

The practice of using the retirement method of valuation has developed despite the decision of the Court of Appeal in *Stokes v. Stokes* (1986), 6 R.F.L. (3d) 342, 8 B.C.L.R. (2d) 80, which leans in favour of the termination method, at least in situations where the retirement date is 18 years away and there is no evidence as to future contingencies.

⁶¹ See *Pension Benefits Division Act*, S.C. 1992, c. 46 (Schedule II), and Pension Benefits Division Regulations, SOR/94-612.

⁶² E. Diane Pask, *Retirement Security, Legislative Change and Division: The Impacts of the B.C. Pension Benefits Standards Act and the Federal Pension Benefits Division Act* (March 24, 1993) (presented to the Family Law Section of the Canadian Bar Association, Victoria, B.C.), at 21.

⁶³ Pension Benefits Division Regulations, *supra*, note 61, s. 15(1)(a).

⁶⁴ Letter from Keith McComb to president of the Federal Treasury Board (July 7, 1994), at 3. A copy of this letter was supplied to the Commission by Keith McComb.

Benefits Act.⁶⁵ The regulations provide that “the pension benefit credit to be divided between the spouses or the parties shall be calculated on the basis that the member’s employment had terminated” on the date of separation.⁶⁶ If, however, the spouses agree to opt out of the pension credit-splitting provisions of the Act, the pension is included in an accounting under *The Marital Property Act*.⁶⁷ The method of valuation used in the accounting is the termination method, with the spouses in most instances using the termination calculation provided by the plan administrator. It is necessary to obtain such a valuation prior to opting out of the provisions of *The Pension Benefits Act*.⁶⁸

It should be noted, however, that the Manitoba Court of Appeal placed some emphasis on the shortcomings of the termination approach to pension valuation in deciding to order an *in specie* division of a pension in *George v. George*.⁶⁹ Sullivan J.A., speaking for the Court of Appeal, made the following observations with respect to the appropriateness of the retirement method of valuation:⁷⁰

Another factor making attribution of any value to a pension plan, of the type in existence in this case, is that the benefits will be paid on a ‘final average’ basis. This means his pension will depend, among other things, on his salary, not at the beginning or during the whole course of his employment, but of the average salary of, say, his best seven out of his last twelve years. (These figures are used only for demonstration purposes). It seems, therefore, that to assess the present value of the husband’s future pension benefits without taking into account the probability or otherwise of the salary in his last years of employment may result in an unrealistic determination of the pension’s value to owner.

It might be argued that the wife should not be entitled to the benefit of final averaging since the parties would be no longer married during the last years of employment, but the husband’s first ten years of contribution are of equal importance with the later years of contribution in the calculation of benefits finally payable. The pension, once it becomes payable, is based on years of service and

⁶⁵ R.S.M. 1987, c. P32 (also C.C.S.M., c. P32).

⁶⁶ The Pension Benefits Act Regulations, Man. Reg. 188/87R, s. 24(1), as am. by Man. Reg. 223/88, s. 1.

⁶⁷ R.S.M. 1987, c. M45 (also C.C.S.M., c. M45).

⁶⁸ *Supra*, note 65, s. 31(6)(b), as en. by S.M. 1992, c. 36, s. 13(3).

⁶⁹ (1983), 35 R.F.L. (2d) 225, 23 Man. R. (2d) 89 (C.A.) (subsequent references are to 35 R.F.L. (2d)).

⁷⁰ *Ibid.*, at 241.

final average earnings; each year worked will increase benefits proportionately. So, a determination of the worth of the pension in money terms for the purpose of making an unequal distribution would involve a prediction of future salary increases; by its very nature this would be highly speculative and would result in the husband's having to transfer to his wife assets now in existence in return for benefits of an undetermined amount which would be payable in future.

**(e) PROPOSALS FOR REFORM IN ONTARIO AND OTHER
CANADIAN JURISDICTIONS**

The issue of the appropriateness of the termination and retirement approaches to pension valuation for family law purposes has been discussed in several reports across Canada and in at least one in Ontario. These reports are divided on the direction of reform. For example, the Alberta Institute of Law Research and Reform (the Alberta Institute) considered the issue of the termination and retirement approaches in its report on *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*.⁷¹ In considering whether benefits accruing after termination of the marriage should be included in the value of the pension, the Alberta Institute opted for a termination approach. It recommended that⁷²

no account be taken of an actual or prospective change in an employee spouse's salary after the division unless at the time of the division the employee spouse has a right to receive the increase in salary or the employer has a right to reduce the salary.

The Alberta Institute settled on a termination approach because to do otherwise would create the "greater unfairness" of allowing non-member spouses to share in benefit accruals that arise after the division of the family property.⁷³ The Alberta Institute recognized that the retirement approach would in most cases result in higher pension values because the member spouses' earnings would be likely to increase over their working lives "to compensate for decreases in the value of money and to share the benefit of increases in individual and general productivity".⁷⁴

⁷¹ Alta. Report No. 48, *supra*, note 7.

⁷² *Ibid.*, at 13-14.

⁷³ *Ibid.*, at 13.

⁷⁴ *Ibid.*, at 10.

The report of the Ontario Ministry of Financial Institutions, *Building on reform: Choices for tomorrow's pensions*,⁷⁵ while not specifically recommending either a retirement or a termination approach to pension valuation, was generally critical of the termination approach to valuing defined benefit plans:⁷⁶

The value of some types of pensions, notably pensions in final average plans, can increase substantially as the plan member nears the final few years of membership, an increase which applies retroactively to all accrued benefits. As a result, the value of the pension as determined at the date of the separation, (often referred to as the 'termination' valuation method), and hence the amount of the pension that can be shared between spouses in the settlement, may be fairly low in comparison with the projected value at retirement, adjusted to take into account the length of the marriage as a proportion of the number of years of plan membership (often referred to as the 'retirement' method of valuation). In effect, the value at the date of separation may not fairly represent the ultimate value of the pension.

The Law Reform Commission of British Columbia (the British Columbia Commission) adopted a retirement method approach to the inclusion of post-separation salary increases in pension valuation in its 1992 *Report on the Division of Pensions on Marriage Breakdown*.⁷⁷ To determine the most accurate value of the pension, the British Columbia Commission recommended that the valuation process take into account future factors that increase the value of the portion of the pension earned during the marriage. More specifically, it proposed that "future salary levels" be taken into consideration. It also recommended that it should be open to the spouses to agree on a different valuation method, or to the courts to vary the division.⁷⁸

⁷⁵ Ontario, Ministry of Financial Institutions (now Ministry of Finance), *Building on reform: Choices for tomorrow's pensions* (March 1989).

⁷⁶ *Ibid.*, at 84.

⁷⁷ B.C. Report No. 123, *supra*, note 7, Regulation 13 of the proposed legislation, at 106-07.

⁷⁸ Regulation 13(1) of the proposed legislation, *ibid.*, provides as follows:

13.(1) Where the Act under sections 52 or 55.10 or the Regulations provides for the satisfaction of pension entitlement by the payment of compensation by the member to the spouse, subject to the agreement of the member and the spouse, or the order of a court, it must be a proportionate share of a sum of money equalling the present value of the future pensions benefits payable to the member.

(2) A determination of the present value under Regulation 13(1) must make reasonable provision for the following contingencies

The British Columbia Commission reasoned that because the value of defined benefit plans is determined by a formula (which often refers to years of service and/or salary increases), failure to take into consideration each year of plan membership would result in the pension being undervalued, because all years of plan membership are of equal importance.⁷⁹

(f) RECOMMENDATIONS FOR REFORM

Given the uncertainty with respect to the application of the termination and retirement methods in pension valuation, it is desirable to prescribe one approach to the treatment of post-separation salary increases and plan improvements. It is the Commission's opinion that the retirement method of valuation for defined benefit plans is the most appropriate for family law purposes.

The use of the retirement method in calculating the present value of the pension plan provides a more accurate indicator of the value of the pension benefit accrued during marriage than does the termination method. The termination method artificially assumes that the pension asset will cease to accrue after the separation of the spouses, whereas the retirement method takes into consideration every year of plan membership.⁸⁰

-
- (a) the possibility that the member may terminate employment or die before retirement,
 - (b) the possibility that the member may retire at an early, later or normal retirement date,
 - (c) the possibility that benefits being divided as family assets and paid under the plan will increase, whether by an automatic formula or on an ad hoc basis, after the date selected for valuing the benefits, and
 - (d) to the extent that benefits being divided as family assets are related to future salary levels, the possibility that salary levels will increase after the date selected for valuing the benefits.

⁷⁹ B.C. Working Paper No. 65, *supra*, note 5, at 128-29.

⁸⁰ See E. Diane Pask, *Drafting Pension Division Legislation: An Overview of Selected Issues* (Toronto: April 7-8, 1989) (paper presented at a joint meeting of the Federal-Provincial Family Law Committee and the Family Law Section, Canadian Bar Association). Pask has argued that the application of the termination method to final or best average plans may not share, in a fair manner, the pension property accrued during marriage because it fails to reflect the true value of the pensions (*ibid.*, at 11-12 (footnotes omitted)):

The retirement method of valuation has been characterized as conflicting with the *Family Law Act* because it considers increases in the value of the pension based on events occurring after the date of marriage breakdown.⁸¹ In the Commission's view, differential treatment can be justified on two grounds. First, pensions are unlike other family assets in their complexity and importance in providing retirement income. The uniqueness of pensions justifies a valuation method that varies from that normally used for valuing assets under the *Family Law Act*. The retirement method produces a more accurate value of pension assets, thereby ensuring that both spouses enjoy a reasonable measure of income security in their future years. Moreover, calculations that account for future changes in the value of an asset are not necessarily inconsistent with the *Family Law Act* scheme if the value is assigned to the portion of the pension entitlement that accrued during the marriage.

Second, pensions currently receive special treatment under the *Family Law Act*. "If and when" arrangements developed to settle equalization claims where one of the family assets is a pension effectively take a retirement approach to pension division. In an "if and when" arrangement, the value of the pension at the date of retirement, and not at the date of marriage breakdown, is divided

Arguments in favour of the 'retirement method' point out that it accords with the plan formula, which requires a determination of pension benefits to be made at retirement and based on actual pre-retirement earnings. Although both employer and employee may contribute, the employer funds a greater proportion of the benefit in the later years than in the early years. The advantage of this type of plan is that the retiring member begins retirement on a level even with inflation. It may be argued that, during the marriage both spouses expected upon retirement to share in the anti-inflationary benefit derived from this type of plan, in whatever amount was ultimately calculated in accordance with the benefit formula. Similarly, they would have expected to share the disadvantage accruing where the employee-employer relationship is terminated after vesting but prior to retirement, should that event have occurred. However, what might not have been expected was that, on marriage break-down, termination of employment would be 'deemed' (it is rare for the end of the marriage and the end of employment to coincide) so as to artificially amend the benefit formula. To share only the termination value on marriage breakdown overlooks the underlying structure of the plan and results in an 'unrealistic determination of the pension's value to the owner'.

See, also, Campbell and Thomson, *supra*, note 19, at C-17, and Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991), at 499.

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Sheryl Smolkin and Janet Downing, *Family Law: Voodoo Economics for Women[:]* *Pension Credit-Splitting Pitfalls* (January 29, 1993) (paper prepared for 1993 Institute of Continuing Legal Education, Canadian Bar Association — Ontario), at 14-15.

between the spouses, recognizing that, while the value of the pension benefit accrues during marriage, it is not actually determined until retirement.⁸²

The retirement method introduces an added element of speculation into the pension valuation process because it is based on a number of assumptions, such as the continuing employment of the member and expected salary increases. If the member terminates employment prior to retirement, the retirement pension benefit accruing may be less than if the member had continued in employment until retirement. Therefore, it will be necessary to impose a discount for the possibility of the member terminating plan membership prior to retirement. The Commission suggests that a mechanism be developed to provide a discount for this contingency.⁸³

The Commission proposes that the calculation of the retirement method be set out in Pension Valuation Regulations. The CIA Standard of Practice should be the basis of such regulations, but requires further development. For example, the Standard of Practice does not set out a method for determining a discount figure with respect to the possibility of the future termination of employment prior to retirement. The Pension Valuation Regulations should also deal with post-separation plan improvements. The Commission's view is that such improvements should be considered, but only where they have been implemented by the time the equalization payment is settled. The CIA is the appropriate body to develop these regulations.

Accordingly, the Commission recommends that the proposed Pension Valuation Regulations should provide that post-separation salary increases be considered in calculating the value of a defined benefit plan based on the approach set out in the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993, and the calculation should include a discount to reflect the possibility of termination of plan membership prior to the member reaching retirement.

The Commission further recommends that the proposed Pension Valuation Regulations should provide that pension plan improvements in existence at the time of settlement of the family property be considered in valuing the pension.

⁸² E. Diane Pask and Cheryl A. Hass, *Division of Pensions* (Calgary: Carswell, looseleaf), at III-18.

⁸³ For example, a termination scale to determine the possibility of a member terminating employment prior to reaching the higher salary levels developed for similar industries or workplaces, or, where possible, individualized scales.

4. RECOGNITION OF PENSION BENEFITS UNVESTED ON DATE OF MARRIAGE BREAKDOWN

(a) INTRODUCTION

In most pension plans, a member is not immediately vested in his or her pension at the commencement of plan membership. The *Pension Benefits Act*⁸⁴ provides that where a member's benefits accrued after December 31, 1986, the member is vested after twenty-four months of plan membership,⁸⁵ and that where a member's benefits accrued before January 1, 1987, the member is vested after attaining the age of forty-five and completing ten years of service.⁸⁶ Some pension plans provide for earlier vesting than the law requires.

The *Pension Benefits Act* provides that once the statutory vesting requirements are met, the member's contributions are locked in until retirement.⁸⁷ Where a member's interest in a pension plan is not vested, the member has the right, on termination of employment, to the return of employee contributions with accrued interest, but has no right to any part of the employer contributions. When the member's contributions are refunded, all pension rights are terminated.⁸⁸

Where a member's interest is vested, the member has a right, on termination of employment, to a benefit from the pension plan. Where the member is not eligible to receive an immediate pension because he or she is not within ten years of the plan's normal retirement date, the member is entitled, on termination of employment, to transfer the commuted value of the deferred pension to another pension plan, a prescribed retirement savings arrangement, or a life annuity.⁸⁹ Where a member is entitled to the immediate pension option, the

⁸⁴ *Supra*, note 2.

⁸⁵ *Ibid.*, s. 37(2).

⁸⁶ *Ibid.*, s. 36(2).

⁸⁷ *Ibid.*, ss. 36(2), 37(2).

⁸⁸ *Ibid.*, s. 63(3), (4).

⁸⁹ *Ibid.*, s. 42(1), and regulations, *supra*, note 2, s. 21(1), as am. by O. Reg. 409/94, s. 3(1).

right to transfer the commuted value to another pension vehicle is available only if the pension plan provides for such an entitlement.⁹⁰

Two issues have arisen in Ontario with respect to the valuation of unvested pension benefits for family law purposes. The first is whether they should be included as property for equalization purposes under the *Family Law Act*.⁹¹ The law with respect to the inclusion of unvested pensions as family property has been somewhat unclear because the *Family Law Act* defines "property" as including "rights under a pension plan that have vested".⁹² It has been suggested that only vested pensions should be included in the equalization process under the *Family Law Act*, in part because of the reference to vested pensions in the definition, and in part because it is not certain that the member spouse would ever receive unvested pension benefits.⁹³

A second unresolved issue in the current law is how to value an unvested pension. Two options have generally been used: an actuarial valuation and a valuation by a contributions method. An actuarial valuation of a pension involves an estimation of the value of the pension, including employer contributions based on services, earnings, mortality, investment return, retirement age, and other factors.⁹⁴ The contributions method is based on a termination approach, where, if the member terminates employment prior to the pension having vested, he or she is only entitled to a return of member contributions plus interest.

The value placed on the pension varies substantially depending on which method is used, particularly where the vesting requirements are based on the pre-reform rules.⁹⁵ While the *Family Law Act* does not prescribe explicitly a contributions approach to valuing unvested pensions, some direction can be taken from the wording of section 4(1) of that Act, where the definition of "property" includes "in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons".⁹⁶

⁹⁰ *Pension Benefits Act* (Ont.), *supra*, note 2, s. 42(3).

⁹¹ *Supra*, note 1.

⁹² *Ibid.*, s. 4(1) "property" (c) (emphasis added).

⁹³ Hovius and Youdan, *supra*, note 80, at 478-79.

⁹⁴ For a discussion of these two methods of valuation, see *supra*, ch. 2.

⁹⁵ Patterson, *supra*, note 3, at 72-73.

⁹⁶ *Family Law Act*, *supra*, note 1, s. 4(1) "property" (c).

This suggests that the Act contemplates including employer contributions only where the pension plan has vested, and that for unvested pensions the contributions method of including only employee contributions is the appropriate approach.

(b) CURRENT LAW IN ONTARIO

There have been many cases in Ontario in which unvested pension rights have been recognized as property for *Family Law Act* purposes.⁹⁷ For support, these cases look to section 56 of the regulations under the *Pension Benefits Act*,⁹⁸ which provides that unvested benefits should be included in determining violations of the fifty-percent rule for the purposes of plan-administered "if and when" arrangements under section 51 of that Act.⁹⁹ However, the case law is divided on how unvested pension benefits should be valued. Many early cases, as well as several more recent ones, have taken a termination approach and included only member contributions plus an interest factor in the value of the pensions, since this is all the member is entitled to on termination.

One example of an earlier case taking this approach is *Lovegrove v. Lovegrove*.¹⁰⁰ The husband's pension had not vested even though he had been employed as a police officer with the Waterloo Regional Police Force for fourteen years. Kurisko L.J.S.C. accepted a valuation of the pension at \$25,219, based on the husband's contributions and accrued interest from the commencement of his employment in September 1971 until the date of separation on September 26, 1985. Kurisko L.J.S.C. rejected the actuarial value of the pension, which was \$31,895.

Similarly, in *Aylsworth v. Aylsworth*,¹⁰¹ the Court was asked to value the husband's interest in a defined benefit plan. The employer's contributions had not

⁹⁷ See, for example, *Ryan v. Ryan*, unreported (July 23, 1986, Ont. Dist. Ct.); *Forster v. Forster* (1987), 11 R.F.L. (3d) 121 (Ont. H.C.J.); and *Thompson v. Thompson*, *supra*, note 30.

⁹⁸ *Supra*, note 2.

⁹⁹ For example, see *Ward v. Ward* (1988), 13 R.F.L. (3d) 259 (Ont. H.C.J.), varied *infra*, note 112.

¹⁰⁰ (1988), 16 R.F.L. (3d) 159 (Ont. H.C.J.), additional reasons unreported (June 24, 1988, Ont. H.C.J.).

¹⁰¹ *Supra*, note 30.

vested as of the valuation date. In valuing the pension, Filer L.J.S.C. accepted a contributions approach and considered only employee contributions plus interest. In his discussion of the appropriate method of valuation, Filer L.J.S.C. simply stated that “[t]he employers’ contributions not having vested are not included”.¹⁰²

In *Lauzon v. Lauzon*,¹⁰³ an unvested pension was valued on a contributions basis. The pension was one year short of being vested. Had the husband terminated employment on the date of separation, the sum of \$2,923, representing his contributions to the plan plus interest, would have been available to him. The actuarial value of the pension, had the parties separated one year later when the pension was fully vested, would have been \$12,000. Wright J. opted for the contributions value of \$2,923.¹⁰⁴ Wright J. concluded that employer contributions should only be included for vested pensions, because prior to the vesting the member has no right to those contributions but only an “expectation”:¹⁰⁵

If the employer has made all of the contributions and if the pension has not vested, then there is no property to be included in the husband’s list of assets. Until the pension vests the husband has no rights. He has, in that quaint Victorian term, an expectation. This is not a form of property, vested or contingent. Once we place a gloss upon the plain words of the legislation, once ‘value’ is considered to be the present value of a future interest rather than a present value of an existing interest, then actuaries must be consulted at great expense to the parties and the time of the court will be occupied in weighing various contingencies.

Where pension plans are non-contributory, several cases have determined that, because there are no employee contributions, the pension should be valued

¹⁰² *Ibid.*, at 111.

¹⁰³ (1992), 42 R.F.L. (3d) 438 (Ont. Gen. Div.).

¹⁰⁴ In coming to this decision, Wright J., *ibid.*, at 441, referred to the following passage of the Ontario Law Reform Commission’s *Report on Family Law[:]* Part IV: *Family Property Law* (Toronto: Ministry of Attorney General, 1974), at 97 (emphasis added):

Generally, the Commission is of the view that pensions should be dealt with in a manner that is analogous to insurance.... [E]mployers’ contributions... should *not* be brought into the equalizing claim calculation.

For the reasons outlined in this report, the Commission’s views regarding the valuation of unvested pensions have evolved since 1974.

¹⁰⁵ *Lauzon v. Lauzon*, *supra*, note 103, at 442.

at zero. For example, in *Nix v. Nix*,¹⁰⁶ the Court was asked to value the husband's interest in a non-contributory defined benefit plan. Although the husband's rights were vested on the date of trial, they were not vested on the valuation date. After noting that on the valuation date the husband had a contingent interest in the plan, McCart L.J.S.C. referred to the definition of "property" in the *Family Law Act* and stated as follows:¹⁰⁷

Paragraph (c) in the definition of property is concerned only with a spouse's rights under a 'vested' pension plan where contributions had been made by other persons including the spouse's employer. A contingent pension plan under which the employee had made contributions would, to the extent of his contributions, be included in his net family property.

McCart L.J.S.C. concluded that "a defined benefit pension plan, if not yet vested, should have a gross value equal to the total employee contributions together with investment yield ... and, accordingly, since the respondent made no contributions to his pension plan there is nothing to be included in his net family property".¹⁰⁸

An actuarial approach to valuing unvested pensions has been adopted in a number of more recent decisions.¹⁰⁹ An actuarial valuation was used in *Ward v. Ward*¹¹⁰ with respect to a non-contributory unvested pension. The value of Mr. Ward's non-contributory non-vested pension was \$4,840. Gray J. of the Supreme Court of Ontario, in rejecting a contributions approach to the valuation of an unvested pension, stated as follows:¹¹¹

It is one thing to say that the exact value to a few dollars cannot be stated, and it is quite another to say that no valuation can be placed on the assets. In many cases this court is required to value real estate, and this is done by estimate. The

¹⁰⁶ (1987), 11 R.F.L. (3d) 9 (Ont. H.C.J.). For a criticism of this decision, see James G. McLeod, Annotation (1987), 11 R.F.L. (3d) 9.

¹⁰⁷ *Nix v. Nix*, *supra*, note 106, at 13.

¹⁰⁸ *Ibid.*

¹⁰⁹ This approach is now required in connection with any valuation under s. 56 of the regulations under the *Pension Benefits Act* (Ont.), *supra*, note 2, for the purposes of determining whether an "if and when" order or agreement under s. 51 of the *Pension Benefits Act* violates the fifty-percent rule.

¹¹⁰ *Supra*, note 99. The approach adopted in this case has received critical support: see, for example, Hovius and Youdan, *supra*, note 80, at 482.

¹¹¹ *Ward v. Ward* (H.C.J.), *supra*, note 99, at 264.

conclusion I reach is that the husband's contingent interest in the non-contributory, non-vested pension entitlement at 1st February 1985 is \$4,840.

Gray J. considered, in the actuarial valuation of the unvested pension, the possibility of future vesting and the likely retirement date. This treatment was upheld by the Ontario Court of Appeal.¹¹²

The decision in *Ward v. Ward* was followed in *Flynn v. Flynn*,¹¹³ which also concerned a non-contributory defined benefit pension plan that was not vested. Flinn Dist. Ct. J. referred to both *Nix v. Nix*¹¹⁴ and *Ward v. Ward*,¹¹⁵ and concluded that the actuarial value of the unvested interest in the pension should be included in the husband's assets for equalization purposes, but that contingencies arising in the future to prevent it from vesting must also be considered.¹¹⁶

Here the husband's pension was little more than two months away from vesting. He was secure in his employment in that termination for any number of reasons was remote. He was of middle age with no evidence of poor health. The discount to the valuation given on an as-if-vested basis would not be substantial. Accordingly, I would value the husband's pension at the date of separation at \$4,836 and include that value in the property of the husband.

(c) RECOMMENDATIONS FOR REFORM

The Commission proposes recommendations with respect to two issues affecting unvested pension benefits: the inclusion of unvested benefits in the *Family Law Act* equalization process and the method of valuing those unvested benefits. First, the *Family Law Act* should be amended to make it clear that unvested pensions are property for equalization purposes. The member's pension rights are earned from the onset of plan membership and accrue from that date, not from when the pension is vested.

¹¹² *Ward v. Ward* (1990), 26 R.F.L. (3d) 149, at 150 (C.A.).

¹¹³ (1989), 68 O.R. (2d) 129, 20 R.F.L. (3d) 173 (Dist. Ct.), additional reasons unreported (April 21, 1989, Ont. Dist. Ct.) (subsequent references are to 68 O.R. (2d)).

¹¹⁴ *Supra*, note 106.

¹¹⁵ *Supra*, note 99.

¹¹⁶ *Flynn v. Flynn*, *supra*, note 113, at 132.

Second, the method of valuing an unvested pension should be based on an actuarial calculation. The contributions approach is an inappropriate valuation method for unvested defined benefit plans.¹¹⁷ The contributions approach does not reflect the true value of the pension interest because it fails to take into consideration employer contributions that increase the value of the pension. In the case of a non-contributory plan, where the employer funds the entire pension, an application of the contributions approach produces an even more inequitable result.

The minimum value of an unvested pension based on an actuarial calculation should be the member's contributions plus interest. In some cases, such as career earnings plans, the member's contributions plus interest may be larger in the early stages of plan membership than the actuarial value. A career earnings plan, as was noted earlier in this report, is one where a defined benefit formula, such as two percent of annual earnings, is used, as opposed to final or best earnings.¹¹⁸

While the pension should be valued on the assumption that it will vest, the value should be discounted, in the Commission's opinion, to take into account the contingency that the member may terminate membership prior to vesting. Any uncertainty with respect to future vesting should be reflected in this discount. In cases where the twenty-four-month vesting rule applies to the unvested pension, the pension benefit should be deemed to be vested without a discount. No discount is necessary, since in all likelihood the pension will be vested by the time the proceedings are completed.

¹¹⁷ The Alberta Institute of Law Research and Reform, in its Report No. 48, *supra*, note 7, at 50-51, supported a contributions approach to valuing unvested pensions and recommended that, before the member's pension benefit vests, its value should be whatever the member would receive if his or her membership in the plan were to be terminated. This would normally include the member's contributions plus interest.

The Law Reform Commission of British Columbia, in its Report No. 123, *supra*, note 7, at 107, recommended the following with respect to the vesting issue:

13.—(2) Where the pension is not a vested pension at the date of valuation, the spouse may elect either to

- (a) postpone valuation until it is ascertained whether the pension vests, or
- (b) have the valuation proceed assuming the pension will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

¹¹⁸ Patterson, *supra*, note 3, at 68.

Accordingly, the Commission recommends that the definition of “property” in section 4(1) of the *Family Law Act* should be amended to include an interest in an unvested pension.

The Commission recommends that the proposed Pension Valuation Regulations should provide that a pension plan that has not vested as of the date of marriage breakdown should be valued actuarially, with a discount for the possibility that plan membership will terminate prior to the occurrence of vesting.

The Commission recommends that the proposed Pension Valuation Regulations should provide that, where an unvested pension is subject to the twenty-four-month membership vesting rules found in section 37 of the *Pension Benefits Act*, the pension should be deemed to be vested, and no discount should be made for the possibility of termination of plan membership prior to this vesting requirement being met.

The Commission further recommends that the proposed Pension Valuation Regulations should provide that the minimum value of an unvested pension should be equal to the member’s contributions plus an interest factor.

5. PENSION COMMENCEMENT AGE

(a) INTRODUCTION

In determining the present value of a pension, it is necessary to select, as a basis for calculation, a date when the pension payment will commence. The calculation of present value is based on a monthly pension payment that will commence at a specific retirement date. Because the actuary cannot predict the exact date of the member’s retirement (or pension commencement), it is necessary to select an assumed pension commencement date. The actuary can choose either the normal retirement date under the plan, the date at which the member will be entitled to retire with an early retirement benefit, or some date in between.¹¹⁹

All plans registered in Ontario must include a provision for a retirement date, and minimum standards for retirement dates are prescribed by legislation. For plans registered or submitted for registration before January 1, 1988, the normal retirement age for benefits accrued on or after that date is deemed to be no later than one year after the age of sixty-five, unless the plan specifies an

¹¹⁹ *Ibid.*, at 22-23.

earlier date.¹²⁰ For plans registered on or after January 1, 1988, the normal retirement age can be no later than one year after the age of sixty-five.¹²¹

The *Pension Benefits Act* also requires that pensions provide an early retirement option where the member is within ten years of attaining the normal retirement age.¹²² The pension available on the early retirement date may be a reduced one, that is, one where the "actuarial equivalent" of the pension accumulated by the member up until the date of early retirement is payable.¹²³ Reduction of the value of the pension based on the actuarial equivalent can result in a greatly reduced pension benefit. For example, where the normal retirement age is sixty-five and the member actually retires at the age of sixty, the reduction is about thirty-five percent.¹²⁴ In other cases, the pension plan may not reduce the pension payable at an earlier retirement date by the full actuarial basis, but rather by an arbitrary discount factor, such as three to six percent for each year of early retirement.¹²⁵ For plans that impose a specified percentage reduction that is less than the full actuarial reduction, the early retirement provisions will increase the present value, but to a lesser extent than an unreduced early retirement provision.

Many pension plans allow members who meet certain qualifying conditions to retire well before normal retirement age with no reduction in overall pension benefits. Most public sector plans have attractive unreduced early retirement pensions, which are available to members once when they meet certain age and service requirements. Once these requirements are met, the unreduced early retirement benefits become vested and the member has a right to them.¹²⁶

Two issues arise with respect to the pension commencement date. The first is whether unvested, unreduced early retirement benefits should be included in pension valuation. The second concerns which retirement date is appropriate for the purposes of valuation: the early retirement date, the normal retirement date, or a selected retirement date.

¹²⁰ *Pension Benefits Act* (Ont.), *supra*, note 2, s. 35(2).

¹²¹ *Ibid.*, s. 35(1).

¹²² *Ibid.*, s. 41(5).

¹²³ Lawrence E. Coward, *Mercer Handbook of Canadian Pension and Benefit Plans*, 10th ed. (North York, Ont.: CCH, 1991), at 37 (hereinafter referred to as "*Mercer Handbook*").

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 38.

¹²⁶ Patterson, *supra*, note 3, at 80-81.

(b) UNVESTED, UNREDUCED EARLY RETIREMENT BENEFITS

If a member meets the minimum vesting requirements for unreduced early retirement benefits, he or she will have an irrevocable right to receive annually the unreduced early retirement pension commencing at the early retirement date calculated according to the terms of the plan. However, in many cases, entitlement to early retirement has not vested at the date of marriage breakdown. In these cases, members do not qualify for an unreduced pension, either because they have not reached a specific age, or because they have not completed a certain number of years of pensionable service, or both. Should the value of this unvested, unreduced early retirement benefit be included in a valuation for *Family Law Act* equalization purposes? The inclusion of an unreduced early retirement benefit will significantly increase the value of the pension asset.

This issue often arises in cases involving pension plans governed by the "rule of ninety". The rule of ninety specifies that an employee can retire on full pension when the employee's age plus years of service equal ninety. For example, the *Ontario Teachers' Pension Act*¹²⁷ provides for an unreduced early retirement pension when age plus service equal ninety. Litigation has arisen in situations where the rule of ninety has not been met. If the pension benefit is valued on a termination basis, that is, as if the member terminated employment on the valuation date, then the unreduced pension benefit is not included because the member has not achieved the necessary years of service to receive it. If the valuation includes the unvested early retirement benefit, the pension value is greatly enhanced. The differences in valuation can be substantial.¹²⁸

(i) Current Law in Ontario

Early cases in Ontario in which courts considered the appropriate method of valuing an unreduced early retirement benefit took a termination approach to including unvested benefits in the present value of the pension asset. The value of unreduced early retirement benefits was therefore excluded because vesting requirements were met after the valuation date (date of marriage breakdown).

¹²⁷ R.S.O. 1990, c. T.1, and *Teachers' Pension Act*, 1989, S.O. 1989, c. 92, Schedule 1, s. 43.

¹²⁸ See, for example, *Stevens v. Stevens* (1992), 41 R.F.L. (3d) 212, 93 D.L.R. (4th) 311 (Ont. U.F.C.) (with unreduced early retirement—\$35,663; without—\$7,579); *Deroo v. Deroo* (1990), 28 R.F.L. (3d) 86 (Ont. H.C.J.) (with—\$51,480; without—\$24,516); *Van Geel v. Van Geel*, unreported (December 17, 1992, Ont. Gen. Div.) (with—\$67,578; without—\$20,600); *Weise v. Weise*, *supra*, note 38 (with—\$230,479; without—\$120,212; and *Salib v. Cross*, *supra*, note 39 (with—\$101,562; without—\$54,159).

Courts were not willing to assume that the member spouse would continue in employment after the date of separation and meet the vesting requirements for the unreduced early retirement benefits.

In *Hilderley v. Hilderley*,¹²⁹ Osborne J. excluded, for valuation purposes, an unreduced early retirement benefit on the basis that it had not vested at the date of separation. If the husband had terminated employment on the valuation date, he would have been eligible to retire on an unreduced pension at the age of sixty-two. Taking his post-valuation date service into account, he would have been eligible to retire on an unreduced pension at the age of fifty-five, according to the rule of ninety. The value of the pension, assuming retirement at the age of fifty-five, was \$330,000, compared with \$283,000 at the age of sixty-two. Osborne J. refused to include the value of the unreduced early retirement benefit, stating that "the retirement method results in the non-pensioned spouse benefiting from increases in capital value accruing after the valuation date", and valued the pension at \$215,000 (after discounting for tax).¹³⁰

Granger J., in *Rickett v. Rickett*,¹³¹ also applied a termination approach in valuing a pension, and excluded an unvested early retirement benefit. He suggested that a retirement approach is "contrary to the provisions of the F.L.A. [Family Law Act]" because "Mrs. Rickett will benefit from Mr. Rickett continuing his employment with the board of education".¹³² If the husband had continued in employment with the board of education until he was fifty-five, the rule of ninety under the *Teachers' Superannuation Act, 1983*¹³³ would have allowed him to retire on a full pension. However, Granger J. was not willing to make that assumption and instead valued the husband's pension as if he had terminated employment on the valuation date.

In other cases, however, Ontario courts have taken a retirement approach to the inclusion of unvested, unreduced early retirement benefits and have considered whether the member spouse would continue to work beyond the valuation date and meet the age and service requirements necessary for vesting.

¹²⁹ *Supra*, note 32.

¹³⁰ *Ibid.*, at 390.

¹³¹ *Supra*, note 30.

¹³² *Ibid.*, at 333.

¹³³ S.O. 1983, c. 84.

For example, in *Alger v. Alger*,¹³⁴ the husband had the option, under the rule of ninety, to retire at the age of fifty-seven, when his age plus years of service totalled ninety. However, at the date of marriage breakdown, he had not met the age plus service requirement. The value of the husband's pension at the age of sixty-five was \$74,255. However, the pension was valued at \$131,054 once the unreduced early retirement benefit was included. McDermid L.J.S.C. included an unvested early retirement benefit in the valuation of the pension without allowing a discount for the possibility of termination occurring prior to the vesting. He found on the evidence that the husband was in good health and would in all likelihood work until the age of fifty-seven, when he would retire.¹³⁵

Therefore, I think the risk that Mr. Alger might terminate his employment before attaining age 57 is so remote and speculative on the evidence before me that no discount ought to be allowed for this contingency.

In *Deroo v. Deroo*,¹³⁶ a retirement approach to the inclusion of unvested, unreduced early retirement benefits was also taken. In that case, Misener L.J.S.C. accepted a valuation of the husband's pension that included an unreduced early retirement benefit commencing at the age of fifty-four. Early retirement depended on the husband's remaining with the Ontario Provincial Police for another seventeen years. Under the pension plan, the husband was entitled to retire on a full pension at the age of fifty-four without reduction because of a provision of the plan that provided for unreduced early retirement benefits upon attaining the earlier of sixty years of age with twenty years of completed service or the date on which age plus years of pensionable service exceeded ninety.¹³⁷ A termination approach would have resulted in the pension being valued based on an assumed retirement age of sixty-five. Misener L.J.S.C. specifically rejected such an approach. He stated that early retirement benefits must be valued without resort to the "fictitious assumption" that the pension holder terminates his or her employment on the valuation date.¹³⁸

Given the fact that the risk of the probability [of not remaining in employment] not occurring is taken into account in the actuarial calculation, the probability can fairly be considered to be, in law, a certainty, even though it relates to a future event. It

¹³⁴ (1989), 21 R.F.L. (3d) 211 (Ont. H.C.J.).

¹³⁵ *Ibid.*, at 216.

¹³⁶ *Supra*, note 128.

¹³⁷ *Ibid.*, at 91.

¹³⁸ *Ibid.*, at 93.

follows that if in fact the pension benefits acquired up to valuation date become payable at 55 if the employee continues in his present employment up to that age, the valuation of the pension benefits must be made on the basis that they will in fact become so payable. To do so does not confer an interest in pension benefits that the employee acquires after valuation date. It simply reflects the true value of the pension benefits acquired up to valuation date.

Similarly, a retirement approach was adopted in the recent case of *Weise v. Weise*,¹³⁹ where Granger J. changed the position he took in *Rickett v. Rickett*¹⁴⁰ and applied a retirement approach to valuing unvested, unreduced early retirement benefits. Granger J. concluded, on the balance of probabilities, that the husband would remain in employment and retire on the early retirement date. Granger J. did, however, include a discount of twenty-five percent for the possibility that the husband would terminate his employment prior to the early retirement date. After reviewing cases that applied the strict termination approach to this issue, including his own earlier decision in *Rickett v. Rickett*, Granger J. stated:¹⁴¹

In *Rickett* I ignored the fact that during cohabitation Mr. Rickett acquired a contingent interest in a future benefit and such interest had a value at the time of separation.

According to Granger J., if it could be established that, on a balance of probabilities, the husband would continue his employment with the board of education and retire at age fifty-six, the value of the husband's pension would be \$230,479, subject to a reduction of twenty-five percent for contingencies.¹⁴² Granger J. found on the evidence that the husband would continue in employment until the unreduced early benefit was earned. However, Granger J. ultimately rejected the likelihood of the husband retiring on the early retirement date.¹⁴³

¹³⁹ *Supra*, note 38.

¹⁴⁰ *Supra*, note 30.

¹⁴¹ *Weise v. Weise*, *supra*, note 38, at 496.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, at 498.

Given the change to the [pension plan], the economic climate in the Province of Ontario at the present time and the financial effects of equalization of net family property, I am satisfied on a balance of probabilities that Mr. Weise will not retire until age 65, and accordingly, the present value of his pension is \$120,212.

A retirement approach was also taken in *Dick v. Dick*¹⁴⁴ in dealing with the inclusion of early retirement benefits in the valuation of pensions. In that case, the parties were married in 1971 and separated in 1989. The husband had been a member of Parliament for twenty years. The pension was immediately payable on the husband's retirement without regard to his age. Ferrier J. applied a retirement approach to valuing the early retirement benefit and assumed that the husband would retire on the early retirement date, which was estimated to be at the age of fifty-five.¹⁴⁵

Not all recent Ontario cases have taken the retirement approach to valuing unvested, unreduced early retirement benefits. In *Blais v. Blais*,¹⁴⁶ Loukidelis J. applied a termination approach. At the valuation date, the husband fell short by thirteen months of the required thirty years of service. The parties separated in 1985, at which time the husband was entitled to a monthly pension of \$551 when he turned sixty-five, based on twenty-nine years of service. If he continued in employment until March 1986, he would earn an unreduced early retirement benefit and his pension benefit would rise to \$850 a month. At the time of the trial, Loukidelis J. valued the husband's pension based on the monthly benefit of \$551 "as if the husband had terminated his employment" on the valuation date.¹⁴⁷ At the date of separation, the parties had been married for twenty-eight of the twenty-nine years that the husband was a member of the plan, and at the date of trial, the husband was in receipt of a \$1,376 monthly pension benefit.¹⁴⁸

Another case where a termination approach was applied to the valuation of an unvested, unreduced early retirement benefit was *Salib v. Cross*.¹⁴⁹ In that case, Chapnik J. did not include an unvested, unreduced early retirement benefit in the value of the pension. The wife's pension without the unvested, unreduced

¹⁴⁴ (1993), 46 R.F.L. (3d) 219 (Ont. Gen. Div.).

¹⁴⁵ *Ibid.*, at 225.

¹⁴⁶ *Supra*, note 36.

¹⁴⁷ *Ibid.*, at 263.

¹⁴⁸ *Ibid.*, at 260.

¹⁴⁹ *Supra*, note 39.

early retirement benefit was valued at \$50,511,¹⁵⁰ compared with \$101,562 including the benefit. After reviewing the case law, Chapnik J. adopted the value of the wife's pension as accrued at the date of termination. She rejected a retirement approach because it would be too speculative to assume that the wife would remain in employment, given her length of service (ten years at the date of trial). Chapnik J. also considered the effect of recent events such as social contract negotiations with government employees in Ontario. However, Chapnik J. did not rule out the retirement approach in all situations:¹⁵¹

The cases suggest that, whereas continued employment might be taken into account when the period of assumed post-separation service is relatively short, it is less appropriate in a situation where a considerable number of additional years is required after the date of separation.

The approach taken in *Salib v. Cross* has been characterized as unfair by one commentator.¹⁵²

The recent case of *Salib v. Cross* stands out as an aberration in this area in that Chapnik, J. espoused a termination method for all purposes but then when determining the date the plan member was most likely to start collecting her pension assumed that date would be the date she could take early retirement, assuming continued employment beyond the valuation date. The value the judge then chose for the pension did not take into account early retirement benefits under the plan, but instead assumed the pension payable at that date was a reduced pension due to service less than that required to receive a full pension. This approach is questionable and does a real disservice to the non-member spouse.

In summary, it can be said that the law on the inclusion of unvested, unreduced early retirement benefits is in a state of flux. Parties can rely on case law to argue for either a retirement or a termination approach to the valuation of these benefits.

(ii) CIA Standard of Practice

While the CIA Standard of Practice does not prescribe either a termination or a retirement approach to valuing unreduced early retirement benefits and

¹⁵⁰ *Ibid.*, at 532.

¹⁵¹ *Ibid.*, at 533.

¹⁵² Catherine D. Aitken, "Pensions Under Part I of the *Family Law Act* of Ontario", in Special Lectures of the Law Society of Upper Canada 1993, *Family Law[:]* Roles, Fairness and Equality (Toronto: Carswell, 1993) 189, at 221 (footnotes omitted).

leaves the issue to the provincial law, it does require that they be addressed by the actuary.¹⁵³ The Standard of Practice requires that the actuary must separately value such benefits accrued at the valuation date "without any discount for possible future forfeiture".¹⁵⁴ It is then left to the court to decide whether the value of the benefit should be included in the overall value of the pension.¹⁵⁵

(iii) Recommendations for Reform

Given the uncertainty with respect to the inclusion of unvested, unreduced early retirement benefits in pension valuations, the Commission believes that the appropriate approach to valuing those benefits should be prescribed by regulation.¹⁵⁶ The value of an unreduced early retirement benefit can be substantial and should be included in the pension value for *Family Law Act* purposes. Excluding the benefit because it is not yet vested would be unfair, given that many members will remain in employment and will avail themselves of at least a portion of that benefit. The Commission agrees with the following comment by Patterson on this issue:¹⁵⁷

There is not much merit to the argument that the spouse should only share in the vested pension payable if the employee were to quit on the date of separation. The advantages of continuing to work until the first unreduced early retirement age make early termination of employment an unlikely possibility. Pension plans are funded on the assumption that the majority of employees will continue to work to the unreduced early retirement date. The contributions that the employer has made reflect this. It seems unreasonable to reduce the spouse's share to 30% or 50% of the value of the final pension using the weak theory that the employee may not remain employed, when the odds are so overwhelming that he will.

¹⁵³ CIA Standard of Practice, *supra*, note 13, at 3.

¹⁵⁴ *Ibid.*, at 3. See *supra*, this ch., text corresponding to note 27.

¹⁵⁵ *Ibid.*, at 4.

¹⁵⁶ The Commission believes that it would be helpful to define "reduced and unreduced pensions" in regulations. For example, a reduced pension could be defined as a pension that will, either before or after the normal retirement date, be less than the accrued pension available at the normal retirement date. Where a reduced pension is payable on the early retirement date, then the normal retirement date should be used as the retirement date for the purpose of calculating the value of the pension.

¹⁵⁷ J.B. Patterson, "Determining a Realistically High Value of the Spouse's Interest in the Employee's Pension" (1986-87), 1 Can. Fam. L.Q. 345, at 352.

In some cases, particularly where the length of service is short or where the member is young at the date of separation, there is a possibility that the member will not continue in plan membership until the vesting requirements are met. It will therefore be appropriate to apply a discount to the value of the unreduced early retirement benefit to take into consideration the possibility of the member not meeting the vesting requirements.

The Commission therefore recommends that the proposed Pension Valuation Regulations should provide that, where a pension plan contains a provision for an early retirement benefit payable to a member on an unreduced basis once certain vesting requirements are met, such a benefit should be valued on the following basis:

- (a) vesting of the unreduced early retirement benefit should be assumed for the purposes of pension valuation, and
- (b) a discount for the possibility that plan membership will terminate prior to the member meeting the vesting requirements should be applied.

(c) ASSUMED RETIREMENT DATE

Even if an unreduced early retirement benefit is included in a pension valuation, it does not necessary follow that the member will avail himself or herself of the entire unreduced early retirement benefit. In fact, that would be contrary to the experience of most plans, since members tend to retire sometime between the unreduced early retirement date and the normal retirement date. To determine the present value of a pension benefit, an actuary must select a date on which it is assumed that the pension will commence. The value of the pension will vary depending on which date is selected.

(i) Current Law in Ontario

In Ontario, cases have taken a number of approaches to determining which retirement date should be used in calculating the present value of defined benefit plans. One approach has been to turn to the evidence to determine the probable retirement date. Courts have attempted to predict the probable retirement date of the member, treating the assumed retirement date as a matter of evidence to be proven on a balance of probabilities. Where there is no evidence or the evidence is unclear, a second approach has been to choose the earliest date for which an unreduced pension is available under the terms of the plan as the assumed retirement date.

In *Messier v. Messier*,¹⁵⁸ Gratton Dist. Ct. J., after reviewing the evidence, chose the earliest date for which an unreduced pension was available as the date on which the employee was most likely to retire.¹⁵⁹ Gratton Dist. Ct. J. was confronted with a choice between the ages of fifty-eight and sixty-five. In determining the probable age of retirement, Gratton Dist. Ct. J. noted that the husband, at the age of fifty-eight, would have been employed as a miner for thirty-four years and that he would therefore probably choose to retire at that age.¹⁶⁰

In *Miller v. Miller*,¹⁶¹ Misener Dist. Ct. J. noted that the husband was entitled to a full pension at the age of fifty-five. Misener Dist. Ct. J. valued the pension as of that date, stating, "I think I should consider that he will indeed retire at that age."¹⁶² Walsh J., in *Marsham v. Marsham*,¹⁶³ also used the unreduced early retirement age of sixty as a basis for the valuation of the husband's pension under the *Public Service Superannuation Act*.¹⁶⁴ He stated:¹⁶⁵

Considering all of the circumstances, it is reasonable to assume that the husband would retire at age 60. It was at that age that the husband would first qualify for an immediate unreduced pension.

Similarly, in *Smith v. Smith*,¹⁶⁶ Mercier J. selected, as the assumed retirement date, the date when the husband would have been entitled to the maximum pension. Mercier J. valued the pension benefit as of the probable date of retirement, defined as the date when the member was "entitled to retire with

¹⁵⁸ (1986), 5 R.F.L. (3d) 251, 14 C.C.E.L. 317 (Ont. Dist. Ct.) (subsequent references are to 5 R.F.L. (3d)).

¹⁵⁹ See, also, *Hodgins v. Hodgins* (1989), 23 R.F.L. (3d) 302 (Ont. H.C.J.), additional reasons at (1989), 24 R.F.L. (3d) 233 (Ont. H.C.J.).

¹⁶⁰ *Messier v. Messier*, *supra*, note 158, at 254-55.

¹⁶¹ *Supra*, note 30.

¹⁶² *Ibid.*, at 123.

¹⁶³ *Supra*, note 30.

¹⁶⁴ R.S.C. 1970, c. 387.

¹⁶⁵ *Marsham v. Marsham*, *supra*, note 30, at 617.

¹⁶⁶ Unreported (June 23, 1993, Ont. Gen. Div.); additional reasons (August 9, 1993, Ont. Gen. Div.).

the maximum pension then available to him of 70% of his average salary".¹⁶⁷ The evidence as to when the husband would retire was unclear, with the wife alleging that he intended to retire as soon as possible with an unreduced pension, and the husband claiming that his retirement date would depend on circumstances at that time.

In *Stevens v. Stevens*,¹⁶⁸ Beckett J. selected the normal retirement date as the pension commencement date. Beckett J. concluded that it is a question of fact in each case whether the employee will likely retire at the normal retirement age or at an earlier date on an unreduced pension. Beckett J. concluded that the husband would likely retire at the normal retirement date because he had an excellent job and no other financial resources. The pension benefit, including the unreduced portion of the early retirement benefit, was valued at \$35,663. If the husband retired at the normal date, the pension would have a value of \$7,579. The wife's evidence was that her husband had told her he intended to retire as early as possible when a full pension was available. The husband's evidence was that he had no intention of retiring early. Beckett J. preferred the husband's evidence.

Haines J., in *Van Geel v. Van Geel*,¹⁶⁹ took the approach that the assumed retirement date should be a matter of evidence proven on the balance of probabilities. Haines J. accepted a normal retirement age of sixty-five (the value of the pension being \$15,450 at the age of sixty-five compared with \$50,684 at the age of fifty-five). He stated:¹⁷⁰

Although he may qualify for a pension at age 55 and this may be seen as an inducement for him to leave his current employment at that time, there is no evidence to lend credence to that assumption. I am, therefore, satisfied on the balance of probabilities that Mr. Van Geel will not retire until age 65 and that is the retirement date that should be used in valuing his pension.

Haines J., in coming to his decision, referred to evidence that the husband was committed to his work and that he intended to work until the age of sixty-five.¹⁷¹

¹⁶⁷ *Ibid.*, at 4.

¹⁶⁸ *Supra*, note 128.

¹⁶⁹ *Supra*, note 128.

¹⁷⁰ *Ibid.*, at 4.

¹⁷¹ *Ibid.*

Other cases have taken the approach that the unreduced early retirement date should be selected as the assumed retirement date where the evidence as to the retirement date of the member is not clear. This approach was first set out by Walsh J. in *Forster v. Forster*.¹⁷²

In my view if there is any conflict whatsoever over the retirement age the court should always adopt the age at which that spouse would first qualify for an unreduced pension. Here that age is 60.

This approach was also followed in *Leeson v. Leeson*.¹⁷³ In that case, the husband's pension was subject to valuation. The husband argued that he had no intention of retiring until his normal retirement date. The wife's evidence was that her spouse had always expressed an intention to retire at the earliest possible opportunity. Flinn Dist. Ct. J. applied the approach in *Forster* and, in light of the conflicting evidence, chose the earliest date on which a full pension was payable.¹⁷⁴

Forster v. Forster was also applied in *Weaver v. Weaver*.¹⁷⁵ Although the normal retirement age was sixty-five, the husband was entitled, under the terms of his plan, to elect an unreduced pension at the age of fifty-seven. The husband testified that he would continue his employment to normal retirement, since he required the extra income from his salary and since his pension benefits would increase the longer he remained in his employment. The wife testified, on the other hand, that her husband had expressed the intention to retire when he was first entitled to an unreduced pension, that is, at the age of fifty-seven. The Court adopted the view expressed in *Forster v. Forster*¹⁷⁶ that, where there is a conflict over the date of retirement, the court should use, as a basis for valuing the pension, the age at which the spouse would first qualify for an unreduced pension.¹⁷⁷

¹⁷² *Supra*, note 97, at 124.

¹⁷³ (1990), 26 R.F.L. (3d) 52 (Ont. Dist. Ct.).

¹⁷⁴ *Ibid.*, at 59. See, also, *Weaver v. Weaver*, *supra*, note 30, at 457, and *Ledrew v. Ledrew* (1993), 46 R.F.L. (3d) 11 (Ont. Gen. Div.).

¹⁷⁵ *Supra*, note 30.

¹⁷⁶ *Supra*, note 97.

¹⁷⁷ See, also, *Ledrew v. Ledrew*, *supra*, note 174.

In *Weise v. Weise*,¹⁷⁸ Granger J. found that there was a lack of evidence concerning the husband's intentions, at the date of separation, with respect to his future retirement. He did not, however, accept the position in *Forster v. Forster*¹⁷⁹ that an absence of such information should result in the retirement date being the earliest possible date that the husband could receive an unreduced pension. Instead, he considered independent evidence produced at trial to determine the retirement date. The wife's testimony was that her husband had told her some years before the date of separation that he would retire at the earliest date possible. Granger J. noted that the husband probably reconsidered his previous statements on retirement during the final days of cohabitation. Because there was no evidence before him on the issue of the husband's intentions at the date of separation, Granger J. looked to other evidence to establish this issue. One piece of evidence concerned an amendment to the Ontario Teachers' Superannuation Fund, made after the parties had separated. This would have allowed the husband to increase his pension benefit after thirty-five years' membership in the plan. Granger J. also referred to general economic conditions in Ontario, which suggested that the husband would have difficulty gaining employment elsewhere. He also observed that the husband had to pay an equalization payment, which would be a financial drain. Granger J. concluded that, on a balance of probabilities, the husband would not retire until the age of sixty-five.

A somewhat different approach to the determination of the assumed retirement date was taken in *Rezler v. Rezler*.¹⁸⁰ In that case, the evidence was not clear as to the intended retirement date of the husband, and the Court took a mid-range value between the normal retirement date value and the early retirement value. The husband was entitled to an unreduced pension at the age of 58.8. His normal retirement age was sixty-five. The Court considered the husband's financial commitments resulting from the divorce and concluded that he would retire somewhere between the ages of 58.8 and sixty-five, and set the retirement age at 61.9.¹⁸¹

In summary, cases that have examined the issue of the assumed retirement date have taken a number of approaches, the most common being an attempt to predict the date of retirement. Judges have turned to the evidence in an attempt to

¹⁷⁸ *Supra*, note 38.

¹⁷⁹ *Supra*, note 97.

¹⁸⁰ Unreported (November 13, 1992, Ont. Gen. Div.).

¹⁸¹ *Ibid.*, at 5.

determine the date on which the member is mostly likely to retire, and used that date as a basis for valuation. Where it has been difficult or impossible to predict the date of retirement, they have resorted to the early retirement date or the normal retirement date, as appropriate.

(ii) CIA Standard of Practice

The CIA Standard of Practice does not prescribe an assumed retirement date for the purpose of determining the present value of a defined benefit plan. Instead, it provides that the pension commencement age to be assumed is a matter of provincial law:¹⁸²

The appropriate retirement age may depend on the retirement provisions of the particular pension plan. Generally, retirement age is viewed by the courts as a question of fact, not as an assumption that is the exclusive province of the actuary. If the question of fact is not clearly resolved before the actuary develops the report, values must be shown at least for the following potential retirement ages:

- the earliest age at which an immediate unreduced pension could be elected by the plan member, contingent only upon uninterrupted future service
- the earliest age at which an immediate unreduced "full" pension could be elected by the plan member, contingent only upon uninterrupted future service (a "full" pension is defined in this context, for example, as a 35-year service pension where plan terms restrict pension credits to 35 years of pensionable service)
- the earliest age at which an immediate unreduced pension could be elected by the plan member, if the member provided no further service beyond the valuation date
- the normal retirement age defined in the plan.

Such an approach develops a set or range of values which are predicated upon determination of fact.

No consideration of future service is applicable where the plan member terminated employment prior to the valuation date (i.e., date of separation).

¹⁸² CIA Standard of Practice, *supra*, note 13, at 6-7.

If the member is known to have terminated after a valuation date but before the date the report was prepared, the actuary should normally exclude any nonvested enhancements which the employee forfeited and disclose that such benefits have been excluded.

As the actuary does possess some expertise with respect to an appropriate retirement age or ages, if the issue of retirement age is not a known fact, the actuary may suggest an appropriate age or range of ages for the purposes of narrowing a range of values, or replacing a range of values with a fair and reasonable single value.

Pension plans often provide reduced early retirement provisions that provide enhanced values if accessed. Whether an actuary must disclose the amount of enhanced values for reduced early retirement provisions is largely a matter of law (the report must disclose the existence of any such enhancements, in any event), and the actuary is expected to be familiar with such circumstances, or clearly disclose otherwise. By way of guidance, for reports under Ontario jurisdiction, any enhanced values afforded by reduced early retirement entitlements would not normally require quantification.

(iii) Recommendations for Reform

The uncertainty in the current law with respect to the appropriate retirement date is undesirable. Of the approaches taken to determine the assumed retirement date, the Commission prefers the approach in *Rezler v. Rezler*.¹⁸³ There, the Court adopted a half-way measure between the unreduced early retirement date and the normal date of retirement.¹⁸⁴ This approach is in accordance with the funding assumption made by most pension plans, namely that the members will, on average, retire sometime between the early unreduced retirement age and the normal retirement age, based on the actual experience under the plan.¹⁸⁵

The normal retirement date is not an acceptable option because it does not consider the value of unreduced early retirement benefits, which can be

¹⁸³ *Supra*, note 180.

¹⁸⁴ *Ibid.*, at 5. The Commission recognizes that this approach does not consider the effects of retiring prior to or after this date. It also does not take into consideration those situations where a slightly reduced retirement benefit is available prior to the earliest unreduced retirement date. Where the member spouse has actually retired or where the member spouse has notified the plan administrator of a retirement date, then that date should be used in determining the value of the pension.

¹⁸⁵ The selection of an early retirement date for the purposes of a valuation under the *Family Law Act*, *supra*, note 1, has no effect on the ultimate retirement date of the member.

considerable.¹⁸⁶ Choosing a normal retirement date where an unreduced early retirement benefit is available would be unfair to the non-member spouse, whose equalization entitlement may be severely reduced as a result. The unreduced early retirement date is also unacceptable because it does not reflect the practical reality that most members do not retire on the unreduced early retirement date, but at some time after that date. Attempting to predict the probable retirement is too uncertain and would, in many cases, involve recourse to the courts. A member, in giving evidence of his or her retirement date, might be influenced by a desire to reduce the equalization payment to the non-member spouse and might, therefore, emphasize a later date. Similarly, a non-member spouse stands to gain from the inclusion of the entire unreduced benefit, and therefore his or her evidence would likely favour an earlier retirement date.

The Commission recommends that the proposed Pension Valuation Regulations should provide that, in calculating the value of an unreduced early retirement benefit, a retirement date that is halfway between the earliest date on which an unreduced early retirement benefit would be available and the normal retirement date under the pension plan should be used as the retirement commencement date for the purposes of pension valuation.

¹⁸⁶ The Alberta Institute of Law Research and Reform, in its Report No. 48, *supra*, note 7, recommended that the normal retirement date, not the early retirement date, be the appropriate date for valuation purposes. The Alberta Institute also recommended that if the member has already made an election, the pension he or she has elected to take should be the one to be valued. The Alberta Institute attempted to balance the interests of the member, the spouse, and the pension plan. Its report stated (*ibid.*, at 53):

On balance we think the option which should be valued is the 'normal' pension which the employee spouse would be entitled to receive under the plan upon his or her 'normal' retirement date. It is true that the employee spouse, when the time comes, may choose another pension or another retirement date. However, the 'normal' provisions are those which the pension plan has chosen as the benchmarks, and, in the absence of any sure way of foretelling the future, and in the absence of an election by the employee spouse to take a more valuable pension or retirement date, we think that justice would be best served by choosing them as the benchmarks for the valuation of a pension benefit for the purposes of division of matrimonial property. Of course, if the employee spouse has already made an election, the pension which he has elected to take should be the one to be valued.

The Law Reform Commission of British Columbia recommended that the determination of the present value for the purposes of a calculation of a compensation payment consider "the possibility that the member may retire at an early, later or normal retirement date": B.C. Report No. 123, *supra*, note 7, at 106.

6. RECOGNITION OF BENEFITS PAYABLE ON DEATH

(a) INTRODUCTION

In addition to providing benefits to a member on retirement, pension plans pay benefits on the death of the member to either a spouse, a child, or a designated beneficiary. The issue therefore arises as to whether benefits paid on the death of a member under a pension plan are "property" under the *Family Law Act*.¹⁸⁷ Benefits payable on the pre-retirement death of the member include lump-sum death benefits and a surviving spouse's pension. Lump-sum death benefits are payable from the pension plan to a beneficiary or the estate of a member. A surviving spouse's pension is a monthly benefit payable to the surviving spouse of a deceased member.

The *Pension Benefits Act*¹⁸⁸ provides for a pre-retirement death benefit where the member has a surviving spouse. Effective January 1, 1987, where a member is vested and dies before the commencement of his or her pension and has a surviving spouse at the time, the surviving spouse is entitled to receive a lump sum equal to the commuted value of the deferred pension in respect of post-1986 accruals. In lieu of a cash lump-sum settlement, the spouse may elect an immediate or deferred life annuity, the commuted value of which is at least equal to the commuted value of the member's post-1986 pension. This includes any excess contributions resulting from the application of the fifty-percent rule to post-1986 benefits.¹⁸⁹ With respect to pre-January 1, 1987 accruals, the death benefit is equal to the member's contributions plus interest.¹⁹⁰ There is ~~no~~ eligibility for pre-retirement death benefits if spouses are living separate and apart at death.¹⁹¹

If there is no surviving spouse with whom the member resides at the time of the member's pre-retirement death, then the member has the option of naming another person as the beneficiary who will be entitled to payment.¹⁹² Where there

¹⁸⁷ *Supra*, note 1, s. 4(1).

¹⁸⁸ *Supra*, note 2, s. 48.

¹⁸⁹ *Ibid.*, s. 48.

¹⁹⁰ *Ibid.*, s. 36.

¹⁹¹ *Ibid.*, s. 48(3).

¹⁹² *Ibid.*, s. 48(6).

is no designated beneficiary and no spouse, the death benefit will be paid to the estate of the member.¹⁹³ However, if the pension plan provides for a payment to a dependent child or to dependent children, that payment will be deducted from the entitlement of the named beneficiary or estate of the member.¹⁹⁴

Benefits paid on the post-retirement death of a member include lump-sum payments, guaranteed annuities, and joint-and-survivor pensions. The *Pension Benefits Act* provides for post-retirement death benefits in the form of a joint-and-survivor pension to a surviving spouse.¹⁹⁵ A joint-and-survivor pension is a pension payable until the death of the retired employee and continuing to the surviving spouse until his or her death. The legislation requires that, at a minimum, sixty percent of the pension being paid continues to the surviving spouse.¹⁹⁶ No joint-and-survivor pension is available where the member is living separate and apart from his or her spouse on the date that payment of the first instalment of the pension is due,¹⁹⁷ or where the member and his or her spouse deliver to the plan administrator, within twelve months preceding the commencement date of the pension, a written waiver of joint-and-survivor pension benefits or a domestic contract containing a waiver.¹⁹⁸ If the parties are living together at the date of the first payment of the pension, the *Pension Benefits Act* requires that the surviving spouse be entitled to these benefits even though the spouses subsequently separate before the member's death.¹⁹⁹ The commuted value of the joint-and-survivor pension cannot be less than the commuted value of the pension that would have been payable to the member.²⁰⁰

The joint-and-survivor pension, while not affecting the overall value of the pension, results in a reduced monthly payment over the lifetime of the member unless it is subsidized by the plan sponsor. For example, an employee who retires at the age of sixty-five might be entitled to a single life pension of \$1,000 per month. If he elects a joint-and-survivor option, the monthly amount payable

¹⁹³ *Ibid.*, s. 48(7).

¹⁹⁴ *Ibid.*, s. 48(8).

¹⁹⁵ *Ibid.*, s. 44.

¹⁹⁶ *Ibid.*, s. 44(3).

¹⁹⁷ *Ibid.*, s. 44(4)(b).

¹⁹⁸ *Ibid.*, s. 46(1).

¹⁹⁹ *Ibid.*, s. 44(4)(b).

²⁰⁰ *Ibid.*, s. 44(2).

during his lifetime will be lower—for example, \$800 a month. On his death, a payment of sixty percent of this amount, or \$480, will continue to be paid to his surviving spouse as long as she lives.²⁰¹ Many pension plans subsidize joint-and-survivor pensions and, instead of the payment to the member being actuarially reduced, it is reduced by an arbitrary amount—for example, five percent. The cost of this subsidy adds significantly to the costs of the pension plan and its value.²⁰²

If the member has no spouse at the time the pension comes into effect, there is no benefit payable on the post-retirement death of the member, unless the plan provides benefits for which a beneficiary could be eligible. For example, individual pension plans often allow members to elect a death benefit in the form of a guaranteed term of five, ten, or fifteen years.²⁰³ A guaranteed annuity is a periodic payment for the life of the member that continues for a fixed term after the death of the member. Generally, the five-year period is the most common form. In the case of a five-year term, there is a guarantee of pension payments for a fixed period of five years, and if a member dies soon after retirement, benefits continue to the individual's estate or named beneficiary for the remainder of the five-year period.²⁰⁴ Sometimes, the guarantee period is equal to the employee contributions with interest at the date of retirement divided by the monthly pension. This is referred to as a "cash refund annuity" (or "life refunding") and guarantees that the beneficiary will receive at least the member contributions with interest, reduced by the benefits already paid out. In this case, the guarantee period is typically two to three years.²⁰⁵ Post-retirement death benefits other than the joint-and-survivor pension are not mandatory under the *Pension Benefits Act*.

(b) CIA STANDARD OF PRACTICE

The CIA Standard of Practice, in setting procedures for valuing death benefits as property of the member spouse, makes a distinction between benefits that are payable to a surviving spouse and those that are payable to any other beneficiary or to the member's estate. The Standard of Practice includes the

²⁰¹ *Mercer Handbook*, *supra*, note 123, at 39.

²⁰² *Ibid.*, at 40.

²⁰³ *Ibid.*, at 38-39.

²⁰⁴ CCH Guide, *supra*, note 13, Vol. 1, ¶ 2357, at 2105.

²⁰⁵ *Ibid.*

value of death benefits in a member's pension if they are payable to the member's estate or to a designated beneficiary, assuming that the member has no surviving spouse at death. According to the Standard of Practice, any death benefits to be granted in respect of a future spouse are to be disregarded in the valuation of the member spouse's pension:²⁰⁶

Pension entitlement means benefits provided through any pension plan or similar program payable to a plan member or a plan member's designated beneficiary. The value attributable to a plan member shall exclude any value that is irrevocably vested in the (separated/divorced) spouse of the plan member, and shall further exclude any value that may be provided in respect of a future spouse. The (separated/divorced) spouse may possess an irrevocably vested survivor benefit entitlement that also requires an actuarial valuation, and if so, the actuary must value such entitlement, also in accordance with this standard of practice.

The Standard of Practice specifies the following with respect to the valuation of vested survivor benefits:²⁰⁷

For all valuation purposes, except where any benefit entitlements are irrevocably vested in the (separated/divorced) spouse, the plan member should be viewed as single. Specifically, any entitlements that may be granted in respect of a future spouse shall be disregarded. Where any benefit entitlements are irrevocably vested in the (separated/divorced) spouse (as is often the case in respect of a pension in the course of payment), the actuary shall develop values that both

- (i) include such benefit entitlements; and
- (ii) exclude such benefit entitlements.

Values for (ii), above, apply to the member. The difference in values (i)-(ii), applies to the spouse of the plan member.

An assumption that a member is 'single' is not a direction that death benefits provided by the pension plan or similar program be disregarded. Where the plan member can control a beneficiary appointment or otherwise realize some value for the death benefit entitlements (such as through a potential transfer of such value to any form of RRSP, etc., upon actual termination of employment), such death benefits normally would be valued, and may be shown separately.

²⁰⁶ CIA Standard of Practice, *supra*, note 13, at 3.

²⁰⁷ *Ibid.*, at 6.

(c) CURRENT LAW IN ONTARIO

In several Ontario cases, it has been decided that death benefits are not property for family law purposes. As a result, the value of these survivor benefits has not been included in the value of the pension. This issue was considered in *Marsham v. Marsham*.²⁰⁸ In that case, it was contended on behalf of the wife that, because the survivor benefits payable under the husband's pension were part of his pension plan, their value must be included in the calculation of his net family property. Walsh J. disagreed and held that because the husband could never receive the death benefits, which were payable only to his eligible survivors, he had no interest in them. Accordingly, the benefits did not fall within the definition of "property", since only the "spouse's interest" in the pension must be included in the husband's net family property.²⁰⁹ The same conclusion has been reached in a number of other cases.²¹⁰

The courts have also considered whether survivor benefits should be valued as property of the surviving spouse. This issue arose in *Humphreys v. Humphreys*,²¹¹ where Galligan J. held that survivor benefits should not be included in the wife's net family property because she was only entitled to receive the benefit if still married to her spouse on the date of his death. Since, in Galligan J.'s estimation, it was "highly probable" that the parties would be divorced before the husband died, he held that no amount should be included in

²⁰⁸ *Supra*, note 30.

²⁰⁹ *Ibid.*, at 612.

²¹⁰ See *Miller v. Miller*, *supra*, note 30, at 122; *Davies v. Davies*, *supra*, note 30, at 110; *Hildeley v. Hilderley*, *supra*, note 32, at 391; and *Humphreys v. Humphreys*, *supra*, note 30, at 123.

Ferrier J. in *Dick v. Dick*, *supra*, note 144, considered death benefits in the form of a five-year guaranteed annuity which, if the husband were unmarried at the date of his death, would be payable to his estate. While not willing to include death benefits in valuing the pension, Ferrier J. did recognize that they might have value in an appropriate case. Ferrier J. stated as follows, *ibid.*, at 231-32:

Death benefits have a uniqueness which makes them difficult to compare to other forms of assets. They are property. They have value. In given circumstances they may be said to have value to the pension holder even though he or she may never receive them (for example, if the pension holder has debt at the time of death, the debt might be satisfied by his estate from the death benefits).

²¹¹ *Supra*, note 30.

the wife's net family property with respect to this benefit.²¹² In Galligan J.'s view,²¹³

whether or not the value of such benefits should be attributable to a spouse's property will depend upon the court's finding as to whether or not it is probable that the spouses will still be married to each other at the time of the pensioner's death. A court may in some cases consider applying a contingency factor to the valuation date value of such benefits, to take into account the possibility of divorce before entitlement.

(d) RECOMMENDATIONS FOR REFORM

The Commission recommends reform in two areas relating to death benefits. One concerns whether benefits payable on the death of a member should be valued as property of the member for family law purposes. The second concerns when survivor benefits should be valued as property of the non-member spouse.

The Commission agrees with the CIA Standard of Practice on the treatment of death benefits. The Standard of Practice values the member's pension as if the member were single and disregards those entitlements granted with respect to a future spouse. The assumption that the member is single does not mean that death benefits are ignored. Where the member has the option of designating a beneficiary or realizing on the value of a death benefit—for example, a payment to his or her estate—death benefits are to be valued. In addition, where the member has the option of electing an alternative form of benefit instead of the spousal benefit, that benefit would be included in the value of the pension.²¹⁴

The exclusion of death benefits from the value of pension assets is too narrow, in light of the *Family Law Act* definition of "property", which includes "any interest, present, or future, vested or contingent".²¹⁵ The Commission agrees with the following comment by Aitken concerning survivor rights:²¹⁶

²¹² *Ibid.*, at 123.

²¹³ *Ibid.*, at 122.

²¹⁴ CIA, Standard of Practice, *supra*, note 13, at 6.

²¹⁵ *Supra*, note 1, s. 4(1) "property".

²¹⁶ Aitken, *supra*, note 152, at 195.

It is arguable that the courts are taking too narrow a view of 'property' when excluding the value of survivor rights. It is fair to assume that one of the employee's economic goals during a lifetime would be to provide for the security of any surviving dependents[sic]. There is a variety of ways in which this could be accomplished, some of which are purchasing life insurance, acquiring assets, or having a pension with survivor benefits. To the extent that the economic security of dependants is guaranteed through survivor benefits, the employee does not have to spend income to obtain security in another form. Furthermore, one would assume that the employee's personal representative could enforce the contract with the employer that eligible survivors would receive benefits following the employee's death. Surely considered from this angle, the employee has an interest in the survivor benefits.

In the Commission's view, the proposed Pension Valuation Regulations should stipulate that a value be attributed to death benefits in accordance with the CIA Standard of Practice, and that this value be included in the value of the pension for family law purposes. The definition of "property" in section 4(1) of the *Family Law Act* should also be amended to include an interest in death benefits in accordance with the Standard of Practice.

Survivor benefits should be valued, in accordance with the Standard of Practice, as property of the non-member spouse only where those benefits are irrevocably vested in the non-member spouse.²¹⁷ For example, a non-member spouse has an irrevocable right to a joint-and-survivor benefit where he or she is living with the member at the date pension payments commence, even if the parties subsequently separate. Vested death benefits should be included in the property of a non-member spouse because the non-member spouse has an irrevocable right to the joint-and-survivor pension that is enforceable against the pension plan.²¹⁸

²¹⁷ One exception to this would be where the parties intend to settle the property through an immediate benefit split. In that instance, the pension in pay will be recalculated and the joint-and-survivor aspect will no longer be available to the non-member spouse: see *infra*, ch. 7.

²¹⁸ The Alberta Institute of Law Research and Reform, in its Report No. 48, *supra*, note 7, at 34-35, recommended that the survivor's pension be included in a subsequent property distribution:

If the employee spouse and the non-employee spouse have gone through a division of matrimonial property but have not been divorced, the survivor's pension may go to the non-employee spouse. We think that in such a case the survivor's pension is clearly part of the proceeds of the pension benefit and that the non-employee spouse should share it with the employee spouse's estate.

The Commission recommends that the definition of "property" in section 4(1) of the *Family Law Act* should be amended to include a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate.

The Commission further recommends that the *Family Law Act* should be amended to provide that a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate should be valued in accordance with the proposed Pension Valuation Regulations.

The Commission recommends that the proposed Pension Valuation Regulations should provide that a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate should be valued on a single life basis in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993.

The Commission recommends that the definition of "property" in section 4(1) of the *Family Law Act* should be amended to include the irrevocable right of the non-member spouse to a death or survivor benefit under the terms of a pension plan.

The Commission recommends that the *Family Law Act* should be amended to provide that the irrevocable right of the non-member spouse to a survivor or death benefit under the terms of a pension plan should be valued in accordance with the proposed Pension Valuation Regulations.

The Commission recommends that the proposed Pension Valuation Regulations should provide that the irrevocable right of the non-member spouse to a death or survivor benefit under the terms of a pension plan should be valued

The Alberta Institute, *ibid.*, at 35, also suggested that the former spouse has an interest in the survivor's pension even where that pension goes to a later spouse or cohabitant:

It might seem anomalous that the former spouse should share in a pension which would not be paid except for the fortuitous circumstance that the employee spouse has remarried or entered into a cohabitation arrangement by the later spouse or cohabiter. However, we think that the survivor's pension is nevertheless part of the proceeds of the pension benefit and that the former spouse should receive the appropriate share. This view is reinforced by the fact that it is likely that the pension received during the employee spouse's lifetime is likely to be less because of the survivorship aspect.

in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993.

7. RECOGNITION OF NON-CONTRACTUAL INFLATION PROTECTION PRACTICES

(a) INTRODUCTION

Many pension plans, particularly those in the public sector, index pensions to the rate of inflation before and after retirement. The indexing in some of these plans reflects the full increase in the Consumer Price Index (CPI), while other plans recognize only a portion of the CPI increase. Many public service pensions are also indexed after termination of employment; these include the Ontario public service and teachers' pensions. Under these pension plans, if a member terminates employment with a deferred pension, his or her pension is increased to reflect the total accumulated increase in the CPI from the date of termination of employment.²¹⁹

Most private sector plans cannot guarantee that pensions will increase each year with the cost of living. Accordingly, many private plans provide inflation protection after retirement through yearly negotiated increases or *ad hoc* amendments. The usual practice is for *ad hoc* increases to reflect, in whole or in part, the last year's increase in the CPI. This avoids the necessity of committing the plan to automatic indexing and therefore to large liabilities that the company might be unable to meet in the future.²²⁰ Indexing, whether on a contractual or a non-contractual basis, dramatically affects the value of a pension asset. While it is accepted that contractual indexing is to be included in the present value of a pension, the law is not settled on the issue of the inclusion of *ad hoc* indexing.

(b) CURRENT LAW IN ONTARIO

The issue of whether to include non-contractual inflation practices in the valuation of a pension asset has not been widely considered in judicial decisions in Ontario. One case where that issue was examined was *Weaver v. Weaver*.²²¹

²¹⁹ Patterson, *supra*, note 3, at 165-66.

²²⁰ *Ibid.*, at 15-16.

²²¹ *Supra*, note 30.

The husband was employed by a company where it had been the policy to provide two percent post-retirement increases in pension benefits to employees, with the increases being implemented every two years. The company was reviewing the policy at the time of trial; no increases had been paid in 1990 and none were contemplated until 1992. Kinsman J. refused to allow for non-contractual indexing, stating that to do so would be too speculative.²²²

Given the uncertain future of the brewing industry as stated by Mr. Weaver, including plant closings resulting from loss of business with resulting reduced profits, the input of the new owners who have apparently placed everything on hold, pending reassessment of the current status, the uncertainty of legislative involvement for imposition of compulsory indexing, one cannot base a judgment on speculation and conjecture as to whether such indexing will continue in future.

Non-contractual indexing practices were also considered in *Paterson v. Paterson*.²²³ In that case, the employer provided for non-contractual indexing and Coe J. agreed to consider it for valuation purposes on the following basis:²²⁴

There is an element of indexing which has come by the good grace of the employer into pension payments over the years. That at some rate, presumably dependant[sic] on the economy and the strength of the employer in that economy, will probably continue. It is very difficult to predict what the indexing rate may be, but doing the best I can with what has been placed before me, I have decided that the valuation should include indexing at a projected rate of 75%. In response to the challenge of why that percentage, and not one 5 to 15 percent lower or higher, I can only state that I have done my best to take into account all the factors placed before me, and have engaged in a process of evaluation of the uncertain to the best of my ability. There is no precise mathematical formula, which when brought to bear, demonstrably produces the right result. Simple arithmetical calculation based on history does not reflect the economies of our time, or the less important, but still relevant, story of very recent events, including those reflected in Exhibit 2, and information given about recent numbers.

(c) CIA STANDARD OF PRACTICE

The CIA Standard of Practice provides for valuing fully indexed pensions (where the pension increases by the same percentage as the CPI), regardless of

²²² *Ibid.*, at 458.

²²³ *Supra*, note 34.

²²⁴ *Ibid.*, at 2.

whether the termination or the retirement method of valuation is used.²²⁵ The Standard of Practice contains the following guidelines for the valuation of pensions with *ad hoc* indexing:²²⁶

In cases where the plan does not provide contractual indexing, the actuary must attempt to ascertain whether the plan sponsor has established a regular and repeated practice of providing periodic pension increases on an *ad hoc* basis. Such a practice shall be ascertained separately for pensions in the course of payment (in which case, the plan would be valued as wholly or partially indexed after the deferral period), and for deferred vested members prior to commencement of pension (in which case the plan would be valued as wholly or partially indexed during the deferral period). Where such increases are known to have been provided in the past, the valuation must make provision for the continuation of this practice unless there is significant evidence to the contrary (e.g., pension agreement excludes indexing where it has previously been included). The incremental value of such potential future adjustments may be reported separately from the present value which excludes allowance for such adjustments. The actuary should clearly disclose the assumption that is being made regarding the continuance of post-retirement adjustments and should preface the value of such adjustments with wording such as 'If the plan sponsor's past practices were to continue, ...'

Where potential adjustments are not taken into account in the value (such as where past practice has not been regular or repeated, or where based upon past precedent, any future *ad hoc* increases appear unlikely), this fact should be disclosed in the actuary's report. In cases where the actuary is unable to determine whether or not such increases have been provided in the past, this fact should be clearly disclosed. In such cases, the actuary should develop values which provide the user of the report with assistance in the quantification of the added value.

The Standard of Practice provides for the treatment of *ad hoc* indexing in the case of career average earnings or flat benefit plans under the retirement method:²²⁷

If the retirement method is used in the valuation of a pension entitlement under a career average earnings or flat benefit plan, the actuary should attempt to ascertain whether accrued benefits have been increased on a regular basis in the past. Where such increases have been provided in the past, the valuation may make provision for the continuation of this practice and the actuary's report should contain wording similar to that described above for *ad hoc* post-retirement adjustments. However, the incremental value of such potential future benefit increases should be reported

²²⁵ CIA Standard of Practice, *supra*, note 13, at 8.

²²⁶ *Ibid.*, at 9-10.

²²⁷ *Ibid.*, at 10.

separately from the present value excluding such increases. Where such potential future increases are not taken into account in the valuation, this fact should be disclosed in the actuary's report. In cases where the actuary is unable to determine whether or not such increases have been provided in the past, this fact should be disclosed.

(d) RECOMMENDATIONS FOR REFORM

In the Commission's view, *ad hoc* indexing should be included in the valuation of a pension in accordance with the CIA Standard of Practice.²²⁸ A history of *ad hoc* indexing can lead to significantly higher pension values, and it would be unfair if these increased values were not reflected in the value of the pension. However, contractual indexing has a greater value than a past practice of *ad hoc* indexing at the same level because it is more certain. Therefore, while *ad hoc* indexing should be recognized, the incremental value should be discounted to recognize the uncertainty as to future *ad hoc* adjustments, taking into account such factors as the circumstances of the employer, the length of time for which adjustments have been provided, and the regularity and consistency of the adjustments. A method of discounting should be developed by the CIA and set out in the proposed Pension Valuation Regulations.

The Commission therefore recommends that the proposed Pension Valuation Regulations should provide that where there has been a history of non-contractual indexing affecting the calculation of pension benefits under a pension plan, the indexing should be included in the valuation of a pension, subject to a discount for the possibility of it not occurring in the future.

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The Law Reform Commission of British Columbia recommended that *ad hoc* indexing be considered in the valuation process: B.C. Report No. 123, *supra*, note 7, at 106. Regulation 13(2)(c) of the proposed legislation provides, in part, that "the possibility that benefits being divided as family assets and paid under the plan will increase, whether by an automatic formula or on an *ad hoc* basis, after the date selected for valuing the benefits": *ibid.*

8. ADJUSTMENT FOR VALUE AT DATE OF MARRIAGE

(a) INTRODUCTION

The definition of “net family property” in section 4(1) of the *Family Law Act*²²⁹ dictates that only the value of the spouse’s pension accumulated during the marriage be included in net family property. The *Family Law Act* requires that the value of property owned at the date of marriage be deducted from the net family property of the spouse. This deduction is particularly complicated in the case of pension assets.

Two methods have been developed for determining the value of pension benefits accrued during marriage.²³⁰ The first, called the “value-added method”, requires that the pension be valued, as of both the valuation date and the date of the marriage. Under the value-added method, an adjustment for the value of the pension at the date of marriage is made by calculating the value of the pension from the date of membership to the date of marriage and deducting that value from the value of pension benefits owned on the date of marriage breakdown or the valuation date. The difference represents the value of the pension accumulated during the marriage.

The second method of accounting for the value of the pension as of the date of marriage, called the “*pro rata* method”, is to pro-rate the value calculated as of the valuation date for the years of the marriage. There are two types of *pro rata* methods. One is to pro-rate the value of the pension based on the benefit payable on the plan (“*pro rata* on benefits approach”), and the other is to pro-

²²⁹ *Supra*, note 1. The *Family Law Act* requires a calculation of the value of the property excluding any value accruing prior to marriage. Section 4(1) provides:

4.—(1) In this Part... ‘net family property’ means the value of all the property, ... that a spouse owns on the valuation date, after deducting, ... (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage.

²³⁰ See Patterson, *supra*, note 3, at 160. See, also, Smolkin and Downing, *supra*, note 81, at 10, and Hovius and Youdan, *supra*, note 80, at 508-09.

Another method, not commonly used, is to value the pension actually earned during the marriage. This was the approach in *Miller v. Miller*, *supra*, note 30, at 123. In that case, the actuary valued the pension actually earned between the date of the marriage and the date of separation. The last 6.3 years of the pension were valued ending on the valuation date.

rate the value based on the years of credited service (“*pro rata* on service approach”).

The *pro rata* on service approach requires that the value of the pension calculated as of the valuation date be multiplied by a fraction, the numerator being the number of years of pensionable service accumulated during the marriage, and the denominator being the number of years of pensionable service accumulated to the valuation date.²³¹ The *pro rata* on service approach is most applicable to final or best average earnings plans, because in those plans the final pension is based on a rate of salary at retirement or on average rates of salary over a specified time, and an increase in the member’s salary results in an increase in the value of the pension for each year of service.

The *pro rata* on benefits approach requires that the value of the pension calculated as of the valuation date be multiplied by a fraction, the denominator being the value of the pension payable at retirement, and the numerator being the value of the pension payable at retirement accumulated during the marriage to the valuation date. The *pro rata* on benefits approach is considered to be the most suitable approach to career average earnings plans because the pension at retirement in those plans is based on the unit of pension for each year calculated as a proportion of that year’s salary, and a unit of pension in a higher salary year is worth more than a unit of pension in a lower salary year. For flat benefit plans, either approach—the *pro rata* on service approach or the *pro rata* on benefits approach—is acceptable, since those plans provide a fixed dollar amount for each year of service without any reference to the member’s salary.

(b) CURRENT LAW IN ONTARIO

The issue of whether the *pro rata* method or the value-added method is most appropriate for the purpose of adjusting for pre-marriage accruals in valuing pension assets has not been widely litigated in Ontario. The question was considered in *Best v. Best*,²³² where Rutherford J. referred to the “termination, value added method” and the “termination, pro-rated method”. In that case, the value of the pension accrued during the marriage on the basis of the value-added method was \$372,041, compared with \$151,480 for the *pro rata* method. Rutherford J. preferred the value-added approach on the basis that it was consistent with the way in which other assets were valued for *Family Law Act*

²³¹ Hovius and Youdan, *supra*, note 80, at 509.

²³² (1993), 50 R.F.L. (3d) 120, 1 C.C.P.B. 8 (Ont. Gen. Div.); additional reasons unreported, *supra*, note 11 (subsequent references are to 50 R.F.L. (3d)).

equalization purposes.²³³ Rutherford J. also pointed out that every year in the life of a defined benefit plan was not equal.²³⁴

In the present case, Mr. and Mrs. Best's 12 year marriage occurred at a stage in which relatively larger contributions were being made to the plan and each year came significantly closer to the point at which benefits would be receivable. Those years were more crucial to both spouses than 12 years earlier in their lives in terms of their being able to make other provision for retirement income.

One Ontario case that applied the *pro rata* method to determining the value of the pension accrued during the marriage was *Smith v. Smith*.²³⁵ Mercier J. took the gross value of the retirement gratuity of \$31,000 and pro-rated it as of October 1, 1988, the date of separation.

(c) CURRENT LAW IN OTHER CANADIAN JURISDICTIONS

The issue of adjusting for pre-marriage accruals was discussed in the recent Saskatchewan case of *Ramsay v. Ramsay*.²³⁶ The husband had been employed by the same company, Saskatchewan Power Corporation, for twenty-one years before he married his wife. After the marriage, he was employed for a further fourteen years, until his retirement. The capitalized value of the pension was \$240,533. Following the *pro rata* method, the value of the pension accrued during the marriage would have been \$95,930. The wife's share would have been one-half of \$95,930, or \$47,965, less taxes.²³⁷ Following the value-added method, the wife's share would have been considerably higher: \$228,590. The wife would have been entitled to one-half of this amount, or \$114,253, less taxes.²³⁸ In other words, the value assigned to the fourteen years of marriage

²³³ *Ibid.*, at 140-41.

²³⁴ *Ibid.*, at 141.

²³⁵ *Supra*, note 166.

²³⁶ (1994), 1 R.F.L. (4th) 447, 111 D.L.R. (4th) 312 (Sask. Q.B.) (subsequent references are to 1 R.F.L. (4th)).

²³⁷ *Ibid.*, at 451.

²³⁸ *Ibid.*, at 451-52.

would have been ninety-five percent of the total value of the pension.²³⁹ Halvorson J. believed this to be unfair for the following reason:²⁴⁰

Invoking the 'value added' methodology in the instant case trivializes the years of service segment of the formula. This is evident from the fact only 5% of the evaluation is attributable to 21 years of service, while the pension formula attributes 60% ($2\% \times 21 \text{ years} \div 70 \times 100$). The 5% number lacks an air of reality.

Halvorson J. also criticized the value-added method on the basis that two separate valuations of the pension lead to greater inaccuracy and that it is particularly inappropriate where a termination method of valuation is used.²⁴¹

There is another criticism of the 'value added' technique. By calculating two capitalized pension evaluations, two sets of educated guesswork result instead of one under the 'pro rata' system. Each set of calculations adopts assumptions. More assumptions lead to less precision.

....

Another criticism of the 'valued added' approach proposed here is that probable salary increases to date of retirement were not factored into the pension value at the date of marriage. This is somewhat contrived because all the husband's raises were known, the pension having matured. By minimizing the value before marriage, the value during cohabitation was maximized.

(d) CIA STANDARD OF PRACTICE

The CIA Standard of Practice provides for three approaches to calculating the amount of pension accumulated during the marriage: (a) the value-added method; (b) the *pro rata* on service approach; and, (c) the *pro rata* on benefits approach. The value-added method and the *pro rata* on service approach result in dramatically different valuations, with the *pro rata* on service approach producing a lower valuation overall. The *pro rata* on benefits approach requires the calculation of the value of the pension at both the marriage date and the valuation date. The *pro rata* on service approach involves only one calculation of the total value of the pension, which is then pro-rated for the length of the

²³⁹ *Ibid.*, at 452.

²⁴⁰ *Ibid.*, at 453-54.

²⁴¹ *Ibid.*, at 454.

marriage. Examples of the differing results of the three approaches are given in the CIA Standard of Practice:²⁴²

At valuation date #1 (*e.g.* marriage), the plan member had 10 years pensionable service, had accrued \$2,000 of annual pension entitlements, which at that date had a value of \$5,000. At valuation date #2 (*e.g.* separation), the plan member had 25 years pensionable service, had accrued \$30,000 of annual pension entitlements, which at that date had a value of \$240,000.

There are three possible approaches to addressing a member's pension entitlement acquired during marriage. One approach is sometimes referred to as 'value added'. Such approach develops the pension asset acquired during marriage as follows:

$$\$240,000 - \$5,000 = \underline{\$235,000}$$

A second approach is sometimes referred to as *pro-rata* (on benefits). Such approach develops the pension asset acquired during marriage as follows:

$$\frac{(\$30,000 - \$2,000)}{\$30,000} \times \$240,000 = \underline{\$224,000}$$

A third approach is sometimes referred to as *pro-rata* (on service). Such approach develops the pension asset acquired during marriage as follows:

$$\frac{(25 - 10)}{25} \times \$240,000 = \$144,000$$

(e) RECOMMENDATIONS FOR REFORM

Clarification of the law regarding the application of the value-added and *pro rata* methods of adjusting for pre-marriage accruals in valuing pension assets is critically important. Because the application of the two methods results in different pension values for equalization purposes, it is desirable that a method be prescribed. The present state of the law leads to disputes and may result in expensive and lengthy litigation. The use of both methods can be justified and criticized on a number of grounds.

It can be argued that the value-added method produces a fairer value of pension accruals during marriage because it reflects the fact that in most defined benefit plans (final average or best years), the pension that is earned in the later years is higher in value. The value-added method reflects this characteristic by distinguishing between pre- and post-marriage accruals. However, the value-

²⁴² *Supra*, note 13, at 4.

added method can be criticized in the context of final or best average defined benefit plans because it ignores the years-of-service aspect of the formula. In addition, while it can be argued that the value-added method is more consistent with the procedure by which the value of other assets is adjusted for pre-marriage accruals under the *Family Law Act*, it is also true that the *pro rata* on service method complies with the adjustment requirement, albeit in a different manner, by assigning a value to accruals made during the marriage.

On reflection, the Commission has determined that it should give preference to the *pro rata* on service method. In making this selection, the Commission seeks to provide a solution that, while fair to the parties, provides the least complex solution to the adjustment issue. In the Commission's view, the *pro rata* on service method meets this criterion.

The value-added method is considerably more difficult and expensive to calculate, because it requires that the value of the pension be calculated on two different dates. In many cases, the information necessary to facilitate a value-added calculation may no longer be available, particularly where the marriage has lasted for a long time. The *pro rata* on service method, on the other hand, involves a much more straightforward calculation, requiring only that the entire pension be valued and a fraction applied to that value to determine the pension accrual during the marriage.

The selection of the *pro rata* on service method is also consistent with the Commission's selection of a retirement method of pension valuation. The application of a retirement method recognizes that the final retirement value of a pension plan is based on every year of plan membership, not just the years of marriage. The *pro rata* on service method considers every year of plan membership in adjusting for pre-marriage accruals, not just those years during the marriage, and weighs all years equally in the overall valuation.

The Commission recognizes that the *pro rata* on service approach will not be applicable to some plans. For example, the *pro rata* on service approach will not apply where the plan is a career earnings plan. In a career earnings plan, the unit of pension accrued each year is computed as a proportion of that year's salary.²⁴³ For example, the annual pension accrued during any particular year may be two percent of earnings for that year. Salary increases do not apply

²⁴³ Patterson, *supra*, note 3, at 68.

retrospectively or prospectively. In such a case, the *pro rata* on benefits approach is the appropriate approach to use in adjusting for pre-marriage accruals.²⁴⁴

In the case of a flat benefit plan, where the benefit is unrelated to salary, a fixed dollar amount for each year of service determines the value of the retirement benefit. Flat benefit plans are generally non-contributory.²⁴⁵ With a flat benefit plan, either a *pro rata* on service approach or *pro rata* on benefits approach may be used to adjust for pre-marriage accruals.²⁴⁶

The Commission therefore recommends that the proposed Pension Valuation Regulations should provide that the *pro rata* on service approach, as developed by the Canadian Institute of Actuaries in its *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993, should be used to adjust the value of the pension as of the valuation date as required by section 4(1) of the *Family Law Act*.

9. INCOME TAX

(a) INTRODUCTION

Revenue Canada allows tax-free contributions to pensions during the accrual of the pension benefit, but taxes pensions as income after retirement.²⁴⁷ Should this obligation to pay taxes in the future be reflected in the valuation process? If a discount should be made for future taxes, how is this discount to be determined? There has been considerable judicial consideration of this issue in Ontario and in other jurisdictions in Canada.

²⁴⁴ Saskatchewan Justice, Pension Benefits Branch, *Division of Pension Benefits on Marriage Breakdown* (Regina: October 1994), at 8.

²⁴⁵ Patterson, *supra*, note 3, at 69.

²⁴⁶ Saskatchewan Justice, Pension Benefits Branch, *supra*, note 244, at 8.

²⁴⁷ *Income Tax Act*, R.S.C. 1952, c. 148, as subsequently re-en. by S.C. 1970-71-72, c. 63, s. 56(1)(a)(i), as amended.

(b) CURRENT LAW IN ONTARIO

The case law in Ontario suggests a case-by-case approach to the determination of the appropriate discount for future taxes. Finlayson J.A. of the Ontario Court of Appeal, in *McPherson v. McPherson*,²⁴⁸ made the following observation with respect to discounting for future taxes in family property valuation:

The cases appear to turn on their own facts and if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property that attracts tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored.

The Court of Appeal in *McPherson v. McPherson* held that a discount for tax should be made only where there is evidence to demonstrate that taxes will be payable in the future, and that no discount should be made unless there is evidence as to future liability for taxes. To do otherwise, in the Court's view, would be too speculative. Subsequently, in *Starkman v. Starkman*,²⁴⁹ the Court of Appeal reaffirmed the approach taken in *McPherson v. McPherson* as the proper approach to be followed in cases decided under the *Family Law Act*, and held that a discount could be made for future taxes only where there was evidence before the court that the asset would be sold and taxes incurred.

The Court of Appeal in *Best v. Best*²⁵⁰ applied the *Starkman* approach in the context of pension valuation under the *Family Law Act*. The Court reaffirmed the position that the application of a discount for tax in the valuation of a capital asset will vary with the circumstances of the case and will require evidence as to the "likelihood and timing of disposition as well as the tax consequences thereon".²⁵¹ However, the Court of Appeal also acknowledged that pensions are subject to a future tax liability. Weiler J.A., speaking for the Court, stated: "Due to the fact

²⁴⁸ (1988), 63 O.R. (2d) 641, at 647, 48 D.L.R. (4th) 577, at 583 (C.A.) (subsequent references are to 63 O.R. (2d)). This case considered the appropriate tax deduction in the value of a company and deducted thirty percent for personal tax, which was "somewhere between 25% for capital gains and 50% for personal income tax": *ibid.*, at 648.

²⁴⁹ (1990), 75 O.R. (2d) 19, at 26, 28 R.F.L. (3d) 208, at 215 (C.A.).

²⁵⁰ (1992), 9 O.R. (3d) 277, 4 R.F.L. (3d) 383 (C.A.) (subsequent references are to 9 O.R. (3d)).

²⁵¹ *Ibid.*, at 283.

that, for taxation purposes, pensions are treated as income, as opposed to capital, it is not speculative to say that they will attract income tax.”²⁵²

Recently, the Court of Appeal in *Sengmueller v. Sengmueller*²⁵³ followed the earlier decision of the Court of Appeal in *McPherson v. McPherson*.²⁵⁴ McKinlay J.A. summarized the principles from the *McPherson* case in the following terms:²⁵⁵

- (1) Apply the overriding principle of fairness, *i.e.*, that costs of disposition as well as benefits should be shared equally;
- (2) Deal with each case on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day; and
- (3) Deduct disposition costs before arriving at the equalization payment, except in the situation where ‘it is not clear when, if ever’ there will be a realization of the property.

The Court of Appeal in *Sengmueller* found that the payment of taxes related to the disposition of family property will not be speculative where it can be established on a balance of probabilities that the property will be disposed of in the future. In those circumstances a reduction in value should be allowed:²⁵⁶

If the evidence satisfies the trial judge, on a balance of probabilities, that the disposition of any item of family property will take place at a particular time in the future, then the tax consequences (and other properly proven costs of disposition) are not speculative, and should be allowed either as a reduction in value or as a deductible liability.

As a result of *McPherson v. McPherson*, *Starkman v. Starkman*, *Best v. Best*, and *Sengmueller v. Sengmueller*, the current approach in Ontario is that a discount for tax should be deducted from the capitalized value of the pension to reflect future liability to pay taxes once periodic payments are received. While it

²⁵² *Ibid.*

²⁵³ (1994), 17 O.R. (3d) 208 (C.A.).

²⁵⁴ *Supra*, note 248.

²⁵⁵ *Sengmueller v. Sengmueller*, *supra*, note 253, at 216, 217.

²⁵⁶ *Ibid.*, at 215.

has been decided that there should be a discount for future liability to pay taxes, the method of determining the discount is not completely settled. In the past, some courts have attempted to predict the tax rate of the member at retirement and to use that as a discount factor. For example, in *Best v. Best*,²⁵⁷ the Court of Appeal, after reviewing cases which indicated a range of twenty-five to thirty-six percent as an appropriate discount for tax, accepted a rate of thirty percent as "the husband's estimate of his tax rate on retirement". Weiler J.A., speaking for Court, stated that "[t]here does not appear to be a great variation in the anticipated rate of tax applicable".²⁵⁸ She characterized the estimate as "a reasonable one and consistent with the percentage allowed at trial in numerous instances".²⁵⁹ She also stated that expert evidence to substantiate the tax rate was not necessary.

Another approach to determining the appropriate discount for future tax liability is to use the current average tax rate of the member. The courts have often imposed average tax rates by applying an average tax rate at the date of valuation based on the member's current tax situation.²⁶⁰ For example, Ferrier J., in *Dick v. Dick*,²⁶¹ was presented with discounts for incoming tax ranging from thirty to forty-two percent and chose "an average tax rate of approximately 40%".²⁶² Ferrier J. chose an average tax rate as distinct from a marginal tax rate, even though the evidence suggested that the husband was

²⁵⁷ *Supra*, note 250, at 283. See, also, *Humphreys v. Humphreys*, *supra*, note 30, at 122, where the Court allowed a discount for tax of twenty-one percent ("the probable tax bracket of the pension holder at the time the pension payments would be made"); *Hodgins v. Hodgins*, *supra*, note 159, at 309, where the Court allowed a discount rate of twenty-five percent, being the "average tax rate after retirement", which was based on "current tax rates and the probable tax situation at retirement"; and *Alger v. Alger*, *supra*, note 134, at 215 ("average tax rate after retirement will be 25%").

²⁵⁸ *Best v. Best*, *supra*, note 250, at 283.

²⁵⁹ *Ibid.*

²⁶⁰ Pask and Hass, *supra*, note 82, at X-18 to X-24. See, also, *Aylsworth v. Aylsworth*, *supra*, note 30, at 112, where a discount for tax was made "equal to the average income tax rate of the husband in 1985"; *Rickett v. Rickett*, *supra*, note 30, at 333, where the discount factor was thirty-four percent ("an average tax rate" of the pensioned spouse); *Marshall v. Marshall*, *supra*, note 30, at 617, where the discount was "the husband's average tax rate"; and *Salib v. Cross*, *supra*, note 39, at 535, where twenty-one percent was used as a discount rate ("average tax rate in the year of separation"). In *Pallister v. Pallister* (1990), 29 R.F.L. (3d) 395 (Ont. Gen. Div.), at 402, a rate of 22.4 percent was used ("Mr. Pallister's average rate for the 1989 taxation year").

²⁶¹ *Supra*, note 144.

²⁶² *Ibid.*, at 232.

likely, on retirement, to pursue a career as a lawyer earning between \$150,000 and \$250,000 per year.²⁶³

In a very few cases, the marginal tax rate has been used.²⁶⁴ This is the rate at which the last dollar of income earned will be taxed. The *Income Tax Act*²⁶⁵ is a progressive tax system where marginal rates increase with income earned. Dollars earned at lower income levels are subject to different rates than dollars earned at higher levels. The marginal tax rate can be distinguished from the average or effective tax rate. The average tax rate is the averaging of the rates over the full amount of income earned. For example, for an individual earning \$36,953 of taxable income after standard deductions, the marginal rate is forty-five percent, but the average rate is 31.6 percent.²⁶⁶

Chapnik J. considered the applicability of average and marginal rates in *Salib v. Cross*.²⁶⁷ In that case, the average tax rate of the wife in the year of separation was twenty-one percent and resulted in a pension valuation of \$39,904. Her marginal rate was thirty percent, producing a pension value of \$35,358. Chapnik J. considered that the marginal rate might be applicable where retirement was near and the member was likely to work after retirement and earn other income. Chapnik J. settled on an average tax rate in the year of separation of twenty-one percent.²⁶⁸

Finally, in a number of cases, the courts have referred to a discount factor with either no justification or on the basis that it was suggested by an actuary. For example, in *Rezler v. Rezler*,²⁶⁹ the Court deducted a twenty-five percent discount factor without further explanation. In *Davies v. Davies*,²⁷⁰ Meehan J.

²⁶³ *Ibid.*

²⁶⁴ For example, see *Weise v. Weise*, *supra*, note 38, at 498. It is not clear if Granger J. in fact used the husband's marginal tax rate, since the discount rate that was selected was twenty-five percent; at the time of trial, the husband was earning \$64,000, an amount where the marginal tax rate would be higher than twenty-five percent.

²⁶⁵ *Supra*, note 247.

²⁶⁶ Pask and Hass, *supra*, note 82, at X-30.

²⁶⁷ *Supra*, note 39.

²⁶⁸ *Ibid.*, at 535-36.

²⁶⁹ *Supra*, note 180.

²⁷⁰ *Supra*, note 30, at 111.

used a figure of twenty-five percent for tax “on the actuarial basis”. In *Miller v. Miller*,²⁷¹ Misener Dist. Ct. J., after selecting a ten percent discount factor, stated with respect to the appropriate discount for tax:

And so I have simply taken a percentage arbitrarily but one that, in my view at least, comes as close to the mark as one can, particularly when this is a matter that rests entirely in the future.

In *Messier v. Messier*,²⁷² Gratton Dist. Ct. J. discounted the pension by thirty percent “for income tax liabilities that will arise eventually”. In *Best v. Best*,²⁷³ Rutherford J. selected a discount factor of twenty-eight percent, stating, “this calculation is necessarily crude in view of the obvious uncertainties”. In *Ryan v. Ryan*,²⁷⁴ Doyle J. set a discount rate of thirty percent for income tax, stating that it seemed acceptable to both parties. In *Post v. Post*,²⁷⁵ McGarry Dist. Ct. J. imposed a twenty-five percent tax factor as probable minimum percentage: “to take any other percentage would be more speculative than that proposed by the expert witness”.

(c) CIA STANDARD OF PRACTICE

The CIA Standard of Practice provides the following approach with respect to discounting for future taxes in pension valuation:²⁷⁶

If a deduction for income tax is developed by the actuary, then the applicable deduction shall be based on the member’s anticipated retirement income computed in ‘current’ dollars, including accrued and projected future pension income, CPP [Canada Pension Plan] and OAS [Old Age Security] entitlements. Other income anticipated may be reflected. Where reflected, the actuary should disclose the amount of such anticipated other income. Upon projecting retirement income in current dollars, the actuary shall apply the deduction developed as the average tax rate paid at the most recent date for which relevant information is available by a

²⁷¹ *Supra*, note 30, at 122.

²⁷² *Supra*, note 158, at 255.

²⁷³ *Supra*, note 232, at 141.

²⁷⁴ *Supra*, note 97, at 10.

²⁷⁵ *Supra*, note 30, at 3.

²⁷⁶ *Supra*, note 13, at 10. The Standard of Practice was applied recently by Chapnik J. with respect to discounting for future taxes in *Salib v. Cross*, *supra*, note 39, at 535.

similar single retired taxpayer with specified deductions, generally limited to age, personal and pension, unless applicable case law in the jurisdiction requires a different treatment. The actuary may also disclose the change in applicable deduction for other proximate levels of income. The actuary may or may not make allowances for the fact that tax brackets are only partially indexed, but should disclose the approach which has been followed.

The Standard of Practice also provides that this approach will not apply where the pension asset will be offset by another pre-tax asset. In certain circumstances,²⁷⁷

where it is clear that the value of a member's pension will be settled by an offset against another similar pre-tax asset, such as the pension of the spouse of the member, then an adjustment for income tax may be ignored as a simplifying measure. In such circumstances, the actuary must clearly explain why a deduction for income tax has not been applied. In other circumstances, where it is clear that the value of a member's pension will be settled by a transfer of a similar pre-tax asset, such as the member's accumulated RRSP balance, then an adjustment for income tax may also be ignored as a simplifying measure. Again in such circumstances, the actuary must clearly explain why a deduction for income tax has not been applied.

(d) RECOMMENDATIONS FOR REFORM

The Commission believes that a discount should be made for the future taxes that the member will be obliged to pay on pension benefits received after retirement. Pensions, like other family assets such as registered retirement savings plans, are subject to tax once the benefit is paid, and this eventuality should be reflected in a valuation. After considering the alternatives, the Commission has settled on the approach set out in the CIA Standard of Practice. The Standard of Practice specifies that unless the member's pension is to be offset against another pre-tax asset,²⁷⁸ a deduction should be made for future taxes based on the member's current average taxes, which should be applied to the member's anticipated retirement income computed in current dollars, including accrued and projected future pension income, Canada Pension Plan,

²⁷⁷ CIA Standard of Practice, *supra*, note 13, at 10.

²⁷⁸ *Ibid.*

and Old Age Security entitlements.²⁷⁹ Other anticipated retirement income may be included by the actuary.

In choosing to follow the Standard of Practice, the Commission acknowledges that the use of an effective tax rate to discount for future taxes has been criticized for resulting in an overly large discount of the pension value.²⁸⁰ However, the Commission prefers an approach that specifies the applicable tax rates and tax deductions to be used, as well as the other types of income that are to be taken into consideration. The alternative of using a prediction of a future tax rate is highly speculative, since it requires many assumptions to be made about future tax rates, future income exemptions, and future tax treatment of pension and other retirement income.

The Commission recommends that the proposed Pension Valuation Regulations should provide that a discount for taxes payable on the pension benefit in the future should be applied in calculating the value of the pension in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993.

10. DISCLOSURE BY PLAN TO NON-MEMBER SPOUSE

(a) INTRODUCTION

Generally, the responsibility of valuing a pension for family law equalization purposes falls to the member when completing a financial statement.

²⁷⁹ *Ibid.*

²⁸⁰ Patterson argues that while the average tax rate is predictable, it "is at too high a price in fairness", because it produces higher tax and discount rates and therefore lower pension valuation and lower shares for spouses: *supra*, note 3, at 301-04.

According to Pask and Hass, *supra*, note 82, at X-28:

At issue ... is the imposition of an 'average rate' of 30 to 35 per cent. Realistically, is this amount too high? Perhaps more importantly, should it be calculated, as currently appears to be the case, based on an assumption that the non-employee spouse assume responsibility for the employee spouse's retirement income level and corresponding rate of tax? The result if the discount rate is too high is that the non-employee spouse will either receive less from a matrimonial property settlement or incur a disproportionate share of the tax burden relative to the employee spouse.

The authority for this proposition is the decision in *Greenwood v. Greenwood*.²⁸¹ To complete the valuation, the member requires certain basic information from the plan that is available only to the member and not to the non-member spouse. In some cases, the non-member spouse may wish to have the plan valued by an independent actuary. While the Commission has sought to develop recommendations that will eliminate the need for two separate valuations of the pension asset, it recognizes that in some instances the non-member spouse may be willing to forgo his or her right to rely on the member to produce and pay for the valuation, and may have one of his or her own done.

Currently, the *Pension Benefits Act* does not directly require the plan to provide the non-member spouse with information regarding the value of the member's pension. The Act only requires that general information regarding the plan be made available.²⁸²

(b) RECOMMENDATIONS FOR REFORM

Where the non-member spouse wishes to have his or her own valuation done, it will be necessary for the non-member spouse to obtain information regarding the member's pension accruals. The non-member spouse should not

²⁸¹ (1988), 18 R.F.L. (3d) 273 (Ont. S.C.), at 274. However, see *Maracle v. Maracle* (1991) 32 R.F.L. (3d) 439 (Ont. Gen. Div.), at 442, where the judge divided the pension on an "if and when" basis after refusing for reasons of cost to force the husband to have it valued so that he could pay out his wife's interest.

See, also, *Dearing v. Dearing* (1991), 37 R.F.L. (3d) 102 (Ont. Gen. Div.), where, in a dispute over who should pay for the valuation of a pension, Stortini J. stated that the husband was required to provide only whatever pension information and valuation he received from his employer and, if that was insufficient, the parties were to select an actuary to do the valuation of the pension, possibly with the assistance of the Court. The cost of the actuarial appraisal was to be borne by the husband, but the cost was to be incorporated into the equalization statement as a joint debt.

²⁸² Under the *Pension Benefits Act* (Ont.), *supra*, note 2, s. 29, spouses of a member or former member are entitled to make a written request to inspect the prescribed documents and information with respect to the pension plan and the pension fund without charge and obtain copies of those documents after paying the prescribed fee. Section 30 of the Act also prescribes that spouses of members or former members are entitled to inspect certain documents filed with the Pension Commission of Ontario. These documents include the details of the pension plan and pension fund, and other "prescribed documents". The spouse is entitled to copies of these documents on payment of the appropriate fees. However, pension plans are reluctant to provide more specific information without the member's consent under s. 29 or a court order under the same section.

have to rely on the goodwill of the member in this instance, and should have the right to receive the necessary information directly from the plan administrator.

The Commission therefore recommends that the *Pension Benefits Act* should be amended to require that the pension plan administrator be obliged to provide the non-member spouse with the information necessary to value the member's pension.

SHARING OF PENSIONS ON MARRIAGE BREAKDOWN: PRELIMINARY CONSIDERATIONS

1. INTRODUCTION

The Commission is aware of the difficulty that parties to a marriage breakdown often experience in settling equalization payments where one of the family assets is a pension. Currently, under Ontario law, the options for settling equalization payments are unsatisfactory. The only available option that directly involves the pension plan is a plan-administered “if and when” arrangement under section 51 of the *Pension Benefits Act*.¹ The shortcomings of the “if and when” provisions were discussed earlier in this report.²

In devising our pension division-at-source scheme as a means of satisfying an equalization payment under the *Family Law Act*,³ the Commission had to address several preliminary issues concerning the basic structure of the scheme and its relationship to the current regime for property sharing under the *Family Law Act*. The following issues were addressed: Should there be mandatory pension division at source on all marriage breakdowns? Alternatively, should there be a presumption for pension division at source on all marriage breakdowns? Should the spouses have the option of dividing pensions outside the *Family Law Act* process? Should the parties be restricted to one choice for dividing pension assets at source, or should they be allowed to choose from a number of options? Should proposals be available in non-separation situations under the *Family Law Act*? Should a retirement approach to benefit splits, as opposed to a termination approach, be adopted? Should a fifty-percent rule be adopted and, if so, in what form? What types of pensions should the proposals apply to? Where should the regime be statutorily located? Should a fee be attached to pension division at source? Should the proposals apply retroactively?

¹ R.S.O. 1990, c. P.8.

² See *supra*, ch. 3.

³ R.S.O. 1990, c. F.3.

When should pension division at source be available to satisfy an equalization payment under the *Family Law Act*?

In this chapter, the Commission outlines the framework of a scheme for settling pension assets on marriage breakdown. These recommendations provide a basis for the development of the specific recommendations for pension division at source set out in chapter 7.

The Commission recommends that a legislative scheme should be enacted ("pension division-at-source legislation") based on the recommendations made in chapter 6 and chapter 7 of this report.

2. MANDATORY OR NON-MANDATORY PENSION DIVISION AT SOURCE ON MARRIAGE BREAKDOWN

A preliminary consideration addressed by the Commission was whether a mandatory pension division-at-source scheme would be feasible in Ontario. Under a mandatory scheme, the parties would have no option but to have the pension asset divided at source on an equal basis. Parties to a marriage breakdown would notify the pension plan administrator, who would then be responsible for valuing and dividing the pension between the parties in accordance with the terms of the legislation. The pension asset would be removed from the equalization process and divided on an equal basis between the parties, independently of other family property. The parties would not have the option of making alternative arrangements such as a lump-sum settlement for sharing the pension asset.

A mandatory system of pension division at source was introduced in Manitoba in the early 1980s.⁴ Under that regime, the parties had no choice but to divide all provincially regulated pensions at source on marriage breakdown. Because the mandatory legislation was considered to be too rigid, it was amended in 1990⁵ to provide for a limited form of opting out, and again in 1992 to provide for unlimited opting out.⁶

⁴ *An Act to Amend the Pension Benefits Act*, S.M. 1982-83-84, c. 79, s. 19. That early legislation is discussed in more detail *supra*, ch. 4.

⁵ *The Pension Benefits Act*, R.S.M. 1987, c. P32 (also C.C.S.M., c. P32), s. 31, as am. by S.M. 1989-90, c. 48, ss. 2, 3.

⁶ *Ibid.*, s. 31(6), as en. by S.M. 1992, c. 36, s. 13(3). The current legislation allows spouses to opt out of the required division where both spouses agree in writing, where a certificate of independent legal advice is filed, and where a valuation of the pension has been completed.

Mandatory schemes for pension division at source have been justified on a number of grounds. It has been suggested, for example, that a mandatory scheme ensures preservation of future income sources for both parties. The reasoning is that because pensions are an important source of income on retirement, the non-member spouse should not be allowed to bargain away his or her interest in this future income source for cash or other assets. Where the non-member spouse accepts cash or other property for the pension at the time of marriage breakdown, he or she may not be adequately provided for at retirement, particularly where the non-member spouse must use the equalization payment to meet current expenses.⁷ In particular, mandatory schemes are viewed as a means of providing a retirement income for women who, after a marriage breakdown, may have limited resources. Mandatory schemes have also been justified on the basis that, since the pension plan bears the responsibility of valuing and dividing the pension asset, there is little cost to the separating parties.⁸

There are, however, a number of disadvantages to a mandatory scheme. First, a mandatory scheme is inconsistent with the regime for property settlement on marriage breakdown currently in effect in Ontario. The *Family Law Act*⁹ requires that pensions be equalized in the context of the overall value of family property. This requires that the pension asset be valued and included in the net family property of the member spouse. After the property of each spouse is added and the necessary deductions made for debts, assets acquired prior to marriage, and exempted property, an equalizing payment is made to ensure that each spouse leaves the marriage with an equal share of the value of the family property. A mandatory system for pension division at source removes pensions from this process.

Second, a mandatory scheme restricts the choices of the parties and, in particular, restricts the options of non-member spouses who might wish a cash settlement. Marriage breakdowns occur to couples of all ages and types, who have different employment histories, pension arrangements, and needs. While some people might welcome the opportunity to provide for their future retirement security by obtaining a division of their spouse's pension, others might prefer to receive an immediate distribution of property, to facilitate the establishment of a new business, for example, or otherwise provide for their future. In many cases, non-member spouses might wish to trade their share in the pension asset for the members' interest in the matrimonial home or for a lump-sum settlement to help

⁷ E. Diane Pask, submission to the Ontario Law Reform Commission on the relationship between valuation and distribution problems in pension division (June 18-19, 1993), at 2.

⁸ E. Diane Pask, *Drafting Pension Division Legislation: An Overview of Selected Issues* (Toronto: April 7-8, 1989)(paper presented at a joint meeting of the Federal-Provincial Family Law Committee and the Family Law Section, Canadian Bar Association), at 5-6.

⁹ *Supra*, note 3, ss. 4(1) "property", 5.

with the transition from marital to separated status. Parties should have the option of dealing with all their assets, with the appropriate legal advice, in a manner they deem best suited to their needs in their particular circumstances.

Third, a mandatory system might result in the division of pensions at source in inappropriate circumstances. This could occur, for example, where the accrued pension is not of significant value, where the marriage was of brief duration, or where both spouses have pensions that are similar in value. In these cases, the benefit to be achieved by dividing the pension at source would be outweighed by the costs associated with the division, both for the parties and for the pension plan.

Fourth, a mandatory scheme might not, in fact, have the desired result. If pension division at source is, for one reason or another, an inappropriate choice for spouses, they are likely to reach an agreement that is designed to undermine or avoid the statutory scheme. Thus, in Manitoba, during the time that legislation requiring pension division at source was in place, couples entered into agreements designed to deal with pension assets outside the mandatory regime. The agreements were found to be illegal, and member spouses who had given consideration to preserve their pension assets were ultimately forced to give up fifty percent of their pensions accrued during marriage, in addition to consideration paid.¹⁰ Restricting the parties' options by the imposition of a mandatory pension division scheme in Ontario would likely lead to the same illegal opting out, with parties negotiating on their own, or through lawyers, to give up their pension interest in exchange for what, in many cases, might ultimately prove to be an invalid consideration.

Fifth, mandatory schemes of pension division at source place an undue administrative burden on pension plan administrators. This burden has the potential to become acute, should recent trends towards high divorce rates continue,¹¹ and should cohabitants be included within the *Family Law Act* regime as recommended by the Commission in its 1993 report.¹² In a mandatory

¹⁰ For example, see *Huppe v. Huppe* (1990), 28 R.F.L. (3d) 70, 66 Man. R. (2d) 241 (Q.B.), where the husband and wife, after eleven years of marriage, entered into an agreement whereby the wife agreed not to make any claim against the husband's pension, in return for which the husband would pay her maintenance for three years to enable her to complete her university education. The husband ceased making payments after eleven months and the wife made a claim against his pension. The Court ruled that the wife would be entitled to one-half the husband's pension, and refused to force the wife to repay.

¹¹ See Jean Dumas and Yves Péron, *Marriage and Conjugal Life in Canada* [:] *Current Demographic Analysis* (Ottawa: Statistics Canada, Demography Division, 1992), at 51.

¹² Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ministry of the Attorney General, 1993) (hereinafter referred to as "*Report on Cohabitants* (1993)").

scheme, the pension plan administrator will be obliged to divide pension benefits whenever a member of the plan is involved in a marriage breakdown. The plan administrator would be in breach of that duty where full payment is made to a member spouse without taking into account the interests of any former spouse of the member. A mandatory scheme would also require the increased involvement of a regulatory body, such as the Pension Commission of Ontario, which would be responsible for ensuring that plans discharge their duty to divide the pensions of their members after marriage breakdown.

The Commission is of the view that the drawbacks of the imposition of a mandatory regime are sufficiently significant to eliminate it as a viable alternative in Ontario.

3. PRESUMPTIVE SYSTEM FOR PENSION DIVISION AT SOURCE

One alternative to a mandatory system is a system that presumes pension division at source to occur in the absence of an agreement to the contrary by the parties.¹³ A presumptive system was recommended by a committee of the Family Law Section of the Canadian Bar Association — Ontario, which suggested as follows:¹⁴

[P]ension division should lie outside the general equalization scheme, and ... the necessary legislation be passed that would allow pensions to be divided in specie with each spouse receiving his or her own pension credits on division. However, the parties should be permitted to contract out of this general rule, and if they wish, to treat pensions as part of the overall equalization scheme.

A presumptive system is currently in effect in Manitoba. In that province, where spouses enter into a separation agreement to divide family assets or where a court orders such a division, and one of the assets is a provincial pension, the pension plan must divide the pension in a manner prescribed in regulations to *The Pension Benefits Act*.¹⁵ This division must be in accordance with the regulations even if an agreement or order provides otherwise.¹⁶ The Act prescribes that non-members have two options for pension credit splitting. In the case of a matured pension, they have the right to receive a portion of the pension payments to

¹³ This is now the system in Manitoba. See *The Pension Benefits Act* (Man.), *supra*, note 5, s. 31(2), as am. by S.M. 1989-90, c. 48, s. 2; 1992, c. 36, s. 13(1).

¹⁴ Canadian Bar Association — Ontario, submission to the Attorney General of Ontario on the *Family Law Act: 1986* (December 12, 1991), at 82, Schedule "G".

¹⁵ The Pension Benefits Act Regulations, Man. Reg. 188/87R.

¹⁶ *The Pension Benefits Act* (Man.), *supra*, note 5, s. 31(2), as am. by S.M. 1989-90, c. 48, s. 2; 1992, c. 36, s. 13(1).

which the member spouse is entitled. In the case of an unmatured pension, they have the right to transfer a portion of the commuted value to another locked-in pension vehicle.¹⁷

The parties can opt out of this method of dividing pensions after reviewing a statement from the administrator of the pension plan stating the value of the pension for transfer purposes or the amount of payments that they would each be entitled to, after receiving independent legal advice, and after entering into a written agreement to divide the pension credits outside *The Pension Benefits Act*.¹⁸ Where opting-out notification is not given, the plan administrator is responsible for meeting the pension credit-splitting provisions if an order or a written agreement is filed with the plan administrator.¹⁹ Where the parties opt out of the pension credit-splitting provisions in *The Pension Benefits Act*, *The Marital Property Act*²⁰ requires that the value of the pension be entered into an accounting and the value of the pension asset be shared.²¹ However, in most cases where the parties opt out of the pension credit-splitting provisions of *The Pension Benefits Act*, it is because the pension is of a low value or both parties have pensions of relatively equal value. Where they have pensions of relatively equal value, the parties on opting out merely retain their interest in the pension assets and do not include the value of the pension in an accounting under *The Marital Property Act*.²² Where the parties opt out because the pension is of a low value, the value used for accounting purposes is usually the commuted value.²³

A presumptive system has many of the advantages of a mandatory system. It provides an inexpensive method of dividing pensions. Once the plan administrator is notified of a marriage breakdown, the plan administrator is responsible for valuing and dividing the pension. Because the pension asset is taken out of the accounting and equalization process and divided separately from other property, there is no need to pay fees to lawyers or actuaries to deal

¹⁷ *Ibid.*, s. 31(4).

¹⁸ *Ibid.*, s. 31(6), as en. by S.M. 1992, c. 36, s. 13(3).

¹⁹ No provisions exist in the Manitoba legislation requiring the parties to notify the plan administrator in order to effect pension division; however, that requirement is implicit because no one else is in a position to do so: telephone conversation with Debbie Lyon of the Manitoba Pension Commission (October 20, 1994).

²⁰ R.S.M. 1987, c. M45 (also C.C.S.M. c. M45).

²¹ *Ibid.*, ss. 15, 17, as am. by S.M. 1992, c. 46, ss. 43, 45.

²² Telephone conversation with Shawn Greenberg of the Manitoba Department of Justice (November 9, 1994).

²³ Telephone conversation with Debbie Lyon of the Manitoba Pension Commission (November 10, 1994).

specifically with the pension asset. A presumptive system also has the advantage over a mandatory system of providing parties with the opportunity to make alternative arrangements to divide pensions where pension division at source is not suitable.

In addition to the disadvantages that a presumptive system shares with a mandatory system, it has several disadvantages of its own. A presumptive system involves pension plan administrators in the marriage breakdowns of their members unless some positive act is taken by the parties to opt out. Because parties have to agree to opt out of a presumptive system, an uncooperative spouse is provided with a potentially exploitative bargaining tool. For example, a non-member spouse may be in a position to force a member spouse to divide a pension against the latter's wishes. Presumably, the member spouse would be required to give some advantage to the non-member spouse, perhaps unfairly, to avoid pension division. Similarly, where the non-member spouse wishes an immediate cash settlement and the member spouse wishes to divide the pension, the member spouse may be in a position to force the non-member spouse to settle for less than fifty percent of the value of the pension to achieve that objective. The Commission is not persuaded that the parties should, at the insistence of either spouse, be required to divide a pension at source.

There is another and more fundamental problem with a presumptive system. In order to be effective, the value of the pension that can be transferred out of the plan on a pension division at source should be the same as the value for equalization purposes. Pensions are typically valued for pension division-at-source purposes based on the value of the pension available to be transferred out of the pension plan on termination of employment.²⁴ The calculation for the commuted value is set out in the Canadian Institute of Actuaries' *Recommendations for the Computation of Transfer Values from Registered Pension Plans*.²⁵ This value, which is a termination value, is not appropriate for valuing pensions for *Family Law Act* purposes.²⁶ Different valuations of the

²⁴ *Pension Benefits Act* (Ont.), *supra*, note 1, s. 42.

²⁵ Canadian Institute of Actuaries, *Recommendations for the Computation of Transfer Values from Registered Pension Plans* (September 1, 1993) (hereinafter referred to as "CIA Transfer Value Recommendations"), reproduced *infra*, Appendix C.

²⁶ The appropriate calculation is set out in Canadian Institute of Actuaries, *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments* (September 1, 1993), reproduced *infra*, Appendix B. For a discussion of the Standard of Practice, see *supra*, ch. 5.

The CIA does not recommend that the Transfer Value Recommendations be used for valuing pensions for family law purposes. See CIA Transfer Value Recommendations, *supra*, note 25, at 2:

pension for pension division-at-source and equalization purposes would necessarily lead to disagreement between the parties. For the foregoing reasons, then, the Commission has decided against a presumptive system of pension division at source.

4. OPTING OUT OF *FAMILY LAW ACT* EQUALIZATION PROCESS

The Commission also considered whether parties to a marriage breakdown should have the option of either assigning a value to the pension asset and including it in the equalization process under the *Family Law Act* (valuation and cash payment), or removing the pension from the equalization process and dividing it apart from other family property (division at source), based on the wishes of the parties.

Most other Canadian jurisdictions allow the parties to choose either division at source or a valuation and cash payment. In Nova Scotia, pensions may be settled under the *Pension Benefits Act*²⁷ or the *Matrimonial Property Act*.²⁸ The *Pension Benefits Act* provides that the parties may apply to the court to divide the pension benefit earned during marriage.²⁹ The parties also have the option of applying to the court under the *Matrimonial Property Act* for the division of matrimonial assets, including pension assets.³⁰ On an application, the court may order that the member spouse pay the non-member spouse a lump sum to effect a division of the property.³¹

Similarly, in New Brunswick, a court can order that pension property be divided at source or that it be valued and a lump-sum settlement be made. The

The recommendations do not apply:

....

f) to the computation of the capitalized value of pension entitlements on marriage breakdown for purposes of lump-sum equalization payments (this is covered in another standard of practice).

²⁷ R.S.N.S. 1989, c. 340.

²⁸ R.S.N.S. 1989, c. 275.

²⁹ *Supra*, note 27, s. 61(2).

³⁰ *Supra*, note 28, s. 15(f).

³¹ Under s. 12(1) of the *Matrimonial Property Act* (N.S.), *supra*, note 28, separated spouses are entitled to apply to the court to have matrimonial assets divided in equal shares, and the court is authorized, notwithstanding the ownership of the assets, to order such a division.

*Marital Property Act*³² provides that, on separation, spouses are entitled to apply to the court to have the marital property divided into equal shares. Where a court makes an order under the *Marital Property Act* with respect to a pension plan, the *Pension Benefits Act*³³ provides that the pension is to be divided in accordance with that order. The *Marital Property Act* further provides that the court may order either spouse to pay to the other the sum set out in the order for the purpose of adjusting the division.³⁴

In Saskatchewan, parties may also divide the pension asset at source or have it valued and settled by a lump-sum payment. The Saskatchewan *Pension Benefits Act, 1992*³⁵ provides that a pension plan administrator is required to divide a pension in accordance with an order made under *The Matrimonial Property Act*³⁶ or an interspousal agreement that conforms with that Act. *The Matrimonial Property Act* provides that the spouses on marriage breakdown may apply to a court for an order that the matrimonial property or its value be distributed equally between the spouses.³⁷ *The Matrimonial Property Act* also provides that the court, to effect a distribution, may order a spouse to pay a lump sum.³⁸

The British Columbia *Family Relations Act*³⁹ gives the court the authority, on marriage breakdown, to "order a spouse to pay compensation to the other spouse" or to order "a division of property".⁴⁰ It also provides that on marriage breakdown, each spouse is entitled to an undivided half interest in the family assets as a tenant in common.⁴¹ The *Family Relations Act* provides that where a spouse is entitled to an interest in a pension, the extent of the interest and the manner in which the spouse's entitlement is to be satisfied must be determined in

³² S.N.B. 1980, c. M-1.1, s. 36.

³³ S.N.B. 1987, c. P. 5.1, s. 44(1).

³⁴ *Supra*, note 32, s. 10(f).

³⁵ S.S. 1992, c. P-6.001, s. 46(1), (2).

³⁶ S.S. 1979, c. M-6.1.

³⁷ *Ibid.*, s. 21(1).

³⁸ *Ibid.*, s. 26(1)(i).

³⁹ R.S.B.C. 1979, c. 121. The Act is amended by the *Family Relations Amendment Act, 1994*, S.B.C. 1994, c. 6, reproduced *infra*, Appendix E. These amendments are to come into force by regulation of the Lieutenant Governor-in-Council.

⁴⁰ *Ibid.*, s. 52(2)(b), (c).

⁴¹ *Ibid.*, s. 43, as am. by S.B.C. 1994, c. 6, s. 4.

accordance with the legislation.⁴² Under Part 3.1 of the Act,⁴³ parties have the choice of pension division at source or the payment of compensation. Where the spouses agree or a court makes an order under the *Family Relations Act*⁴⁴ for the member to pay compensation to the spouse, the compensation payment must be calculated in accordance with the regulations unless the spouse and member agree otherwise or the court orders otherwise.⁴⁵

Manitoba has an accounting and equalization scheme for settling family property similar to that in place in Ontario.⁴⁶ *The Marital Property Act* provides that spouses on marriage breakdown have the right, on application, to have an accounting and an equalization of assets.⁴⁷ The amount owed after an accounting may be satisfied by the payment of a lump sum.⁴⁸ However, where one of the family assets is a provincially regulated pension, *The Pension Benefits Act* provides that the division must follow the regulations under that Act.⁴⁹ *The Pension Benefits Act* "effectively takes provincially regulated pensions out of the accounting process under *The Marital Property Act*"⁵⁰ because of section 10 of the latter Act, which provides that the legislation does not apply to any asset that has already been shared equally between the spouses. *The Pension Benefits Act* stipulates that pensions are to be divided at source in accordance with the legislation unless the parties agree to opt out.⁵¹ Where the parties opt out of the pension credit-splitting provisions, the pension is included in the accounting and equalization provisions of *The Marital Property Act*.

After a review of the approaches in the other Canadian jurisdictions, the Commission has concluded that the approach taken in the current Ontario

⁴² *Ibid.*, s. 55.2(1), as en. by S.B.C. 1994, c. 6, s. 8.

⁴³ *Ibid.*, as en. by S.B.C. 1994, c. 6, s. 8; see ss. 55.3, 55.4, 55.5, 55.6, 55.7, 55.92(4).

⁴⁴ *Ibid.*, s. 52, as am. by S.B.C. 1987, c. 42, s. 24; 1994, c. 6, s. 6.

⁴⁵ *Ibid.*, s. 55.92(3), as en. by S.B.C. 1994, c. 6, s. 8.

⁴⁶ See *The Marital Property Act* (Man.), *supra*, note 20, s. 15, as am. by S.M. 1992, c. 46, s. 43.

⁴⁷ *Ibid.*, s. 13, as am. by S.M. 1992, c. 46, s. 41.

⁴⁸ *Ibid.*, s. 17, as am. by S.M. 1992, c. 46, s. 45.

⁴⁹ *Supra*, note 5, s. 31(2), as am. by S.M. 1989-90, c. 48, s. 2; 1992, c. 36, s. 13(1).

⁵⁰ James G. McLeod and Alfred A. Mamo (eds.), *Matrimonial Property Law in Canada* (Toronto: Carswell, looseleaf), Vol. 1, at M-49 (1993 release).

⁵¹ *Supra*, note 5, s. 31(2), (6), as am. by S.M. 1989-90, c. 48, s. 2; 1992, c. 36, s. 13(1), (3).

legislation—including pensions within the *Family Law Act*⁵² equalization process set out in section 5 of that Act—should be retained. A scheme whereby parties could, by agreement or court order, opt in or out of the *Family Law Act* provisions was viewed as undesirable in the Ontario context for several reasons.

First, the Commission was concerned that allowing pensions to be dealt with either within or outside the *Family Law Act* equalization process, at the option of the parties, would result in a scheme that was unduly complicated and would frequently result in litigation. Arriving at a consensual division of family property would be difficult for a number of reasons. While one party might prefer a cash settlement for the pension asset, the other party might wish to defer pension division until retirement to maintain his or her current cash position. Further, earlier recommendations by the Commission for a retirement method of valuation for *Family Law Act* equalization purposes would conflict with the termination approach adopted under the *Pension Benefits Act*⁵³ for transfer purposes. An accounting and equalization would provide for a larger immediate cash payment than the lower locked-in value that would be available on a pension division at source.

Second, the method by which debts are treated under the *Family Law Act* could also make the inclusion or exclusion of the pension asset in the equalization process a highly contentious issue. An equalization claim cannot result in a negative net family property figure. If the calculation of net family property results in a negative value (because, for example, debts exceed assets), then the *Family Law Act* deems the spouse's net family property to be equal to zero.⁵⁴ In Ontario, debts are shared by both spouses only to the extent of the value of each spouse's assets.

Parenthetically, we note that the *Family Law Act* provisions regarding the treatment of debts arise out of recommendations made by the Commission in its earlier *Report on Family Law*.⁵⁵ The Commission's reasoning was that debts,

⁵² *Supra*, note 3. Under that equalization process, parties are entitled under s. 7 of the *Family Law Act* to apply to court to determine "any matter respecting the spouses' entitlement under section 5". Section 9 of the Act sets out the type of orders that a court may make in an application under s. 7. For a more detailed discussion of these provisions, see *supra*, ch. 3, sec. 2 "Equalization Process under *Family Law Act*".

⁵³ *Supra*, note 1, s. 42.

⁵⁴ *Supra*, note 3, s. 4(5). Removing pensions from the *Family Law Act* equalization process would also cause problems where a court orders an unequal sharing of the value of family assets under s. 5(6).

⁵⁵ Ontario Law Reform Commission, *Report on Family Law[:]* Part IV: Family Property Law (Toronto: Ministry of Attorney General, 1974), at 67 (hereinafter referred to as "*Report on Family Law* (1974)").

whether of a business or personal nature, should only be taken into consideration in the equalization process to the extent that they result in the reduction of the net family property to zero. To share losses further was seen as advancing the position of the spouse with the greater debts. The Commission was specifically concerned about the situation where a spouse has incurred debts of a business or professional nature and the other spouse has not benefited. In this instance, it was considered unfair to penalize the spouse who did not participate in incurring the debt.⁵⁶

Allowing the parties to opt out of the *Family Law Act* would undoubtedly give rise to disputes where the member spouse with a pension asset has few other assets and excessive debts. If the member spouse's debts, accumulated during the marriage, exceed the value of his or her other property, the member would benefit from leaving the pension in the equalization calculation, while the non-member spouse would benefit from its removal. Including the value of the pension in the member's calculation of net family property in those circumstances would result in the member retaining a large portion of his or her property. Removing the pension from the equalization process would result in the member spouse giving up one-half of his or her pension, while retaining the responsibility for a larger portion of his or her debts.⁵⁷

Providing parties with a choice between pension division at source, on the one hand, and valuation and cash payment, on the other, would be contrary to the basic scheme for the settlement of family assets found in the *Family Law Act*. Other provinces that provide for an either/or approach have fundamentally different systems for settling family assets. In those jurisdictions, the court has authority to divide an asset *in specie* apart from other family property, or to have it valued and the value shared between the parties through a lump-sum payment. In Manitoba, a presumptive system for pension division at source effectively removes the pension from the accounting and equalization process.

The approach of leaving pensions in the equalization process under the *Family Law Act* is consistent with the recommendations made two decades ago by

⁵⁶ *Ibid.*, at 66. Manitoba has a similar provision in *The Marital Property Act*, *supra*, note 20. Debts and liabilities (with certain exceptions) can be deducted from a spouse's inventory of assets, but they cannot be deducted to effect a negative value except by court order: *ibid.*, s. 11, as am. by S.M. 1992, c. 46, s. 39.

⁵⁷ For example, where the member spouse has debts of \$200,000, non-pension assets of \$50,000, and a pension valued at \$150,000, removal of the pension from the equalization process would result in the member transferring one-half the pension to the non-member spouse. If, however, the pension remains in the equalization payment, the member would retain 100 per cent of his or her pension and have a net family property of zero.

the Ontario Law Reform Commission.⁵⁸ At that time, the Commission suggested that the division of property on marriage breakdown be based on the principle that “unless the contrary is shown... all the property of each spouse is shareable”.⁵⁹ The mechanism for the sharing of assets was the equalization process: all the property of the individual spouse, however and whenever acquired, “should be treated as a single pool of assets for the purpose of ascertaining the amount of shareable net capital gains or the amount of net capital losses to be borne by the owner-spouse”.⁶⁰ The Commission expressly dealt with pensions, including them in this equalization process:⁶¹

Accordingly, it is recommended that the amounts paid into a pension plan ... should be shareable assets, and should be included in the net estate of the spouse to whom the pension is payable. If a substantial sum had been built up, and the spouse in whose shareable assets it was included was liable to pay an equalizing claim, then he or she could always elect ... to pay the claim over a period of years.

Finally, removing the pension from the equalization process would result in its being treated differently from other non-realizable assets and other retirement investments such as registered retirement savings plans (RRSPs), stocks, bonds, debentures, mutual funds, the family home, unregistered pension plans, deferred profit-sharing plans, and other retirement and compensation arrangements. The Commission views this differential treatment for equalization purposes as undesirable.

5. MULTIPLE-OPTION SCHEME VERSUS SINGLE-OPTION SCHEME FOR PENSION DIVISION AT SOURCE

In devising a scheme for pension division at source, the Commission considered the merits of a single-option scheme as opposed to a multi-option scheme. Several Canadian jurisdictions have adopted the single-option approach and have restricted parties to either a transfer or a benefit split, but have not allowed them to choose between those two options. For example, a transfer at the

⁵⁸ *Report on Family Law* (1974), *supra*, note 55.

⁵⁹ *Ibid.*, at 80.

⁶⁰ *Ibid.*, at 81.

⁶¹ *Ibid.*, at 97. It should be noted that the reference in the *Report on Family Law* (1974) to “amounts paid into a pension plan” refers to employee contributions. The Commission explicitly rejected the idea of employer contributions being included in the value of the pension at that time. However, that portion of the recommendation is no longer endorsed by the Commission since it does not reflect current methods of valuing a pension nor the recommendations in the present report.

time of marriage breakdown is the only option available in New Brunswick⁶² and Manitoba,⁶³ and in public plans falling under the federal *Pension Benefits Division Act*.⁶⁴ A benefit split, effective on the member spouse's actual retirement date, is the only option for pension division at source in Prince Edward Island⁶⁵ and Nova Scotia.⁶⁶ Quebec⁶⁷ and Saskatchewan⁶⁸ have adopted a multi-option scheme, and pension plans covered by the federal *Pension Benefits Standards Act, 1985*⁶⁹ also allow parties to choose between a transfer and a benefit split.

The Commission prefers the multi-option approach to pension division at source. In essence, the basis for this conclusion is that the multi-option scheme is the more desirable of the two because it will provide parties to a marriage breakdown with greater flexibility to deal with pension assets in a manner that is appropriate to their own circumstances.⁷⁰ A multi-option approach will allow the parties the choice of either a transfer at the time of marriage breakdown or a benefit split at the time of retirement to satisfy an equalization payment. The introduction of a transfer option will greatly improve the options available for the settlement of pension assets in Ontario. The current provisions of the *Pension*

⁶² *Pension Benefits Act* (N.B.), *supra*, note 33.

⁶³ *The Pension Benefits Act* (Man.), *supra*, note 5.

⁶⁴ S.C. 1992, c. 46 (Schedule II).

⁶⁵ *Pension Benefits Act*, S.P.E.I. 1990, c. 41 (not yet proclaimed).

⁶⁶ *Pension Benefits Act* (N.S.), *supra*, note 27.

⁶⁷ *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1.

⁶⁸ *Pension Benefits Act, 1992* (Sask.), *supra*, note 35.

⁶⁹ R.S.C. 1985, c. 32 (2nd Supp.).

⁷⁰ This was suggested in the *Report of the Gender Equality Subcommittee of the Pension Benefits Section of the Canadian Bar Association — Ontario* (May 4, 1993) (Co-chairs: Dona Campbell and Melissa Merker) (hereinafter referred to as "Campbell and Merker"). The Committee members considered three alternatives (*ibid.*, at 17):

- a) no change to the PBA,
- b) amendments to the PBA to provide more flexibility to the parties in dealing with pension assets; and
- c) mandatory system of division on marital breakdown.

They concluded (*ibid.*):

Committee members are in general agreement that the current provisions of the PBA dealing with pension issues on marital breakdown are inadequate. No consensus was reached. However, most Committee members favour further flexibility in dealing with the assets in these circumstances.

Benefits Act restrict payment out of the plan to satisfy an equalization order to the time when the member ceases membership in the plan (by means of termination of employment, termination of the plan, death, or retirement of the member).⁷¹ The lack of an immediate transfer option has been criticized as a major deficiency of the Ontario system.⁷²

The availability of a benefit split option is also desirable. Benefit splits accommodate parties who are close to retirement age and wish to receive payments directly from the plan. A non-member spouse may not want to go to the market to buy a pension and pay a third party to administer his or her retirement income. It is also unlikely that a non-member spouse would be able to purchase a pension with the same features and value that would be gained under the pension plan.⁷³ While the Commission believes that a benefit split should be an option in Ontario, it does not believe that it should be retained in its current form.⁷⁴

6. BENEFIT SPLITS: RETIREMENT VERSUS TERMINATION APPROACH

In this report, the Commission has made a number of recommendations concerning principles and methods of pension valuation for *Family Law Act* equalization purposes.⁷⁵ These recommendations consistently favour the adoption of a retirement approach to valuation as opposed to a termination approach. The retirement approach attempts to determine the ultimate value of the pension accrued during the marriage by taking into consideration post-separation salary increases; post-separation plan improvements; unvested pensions; unvested, unreduced early retirement benefits; and non-contractual inflation practices. A termination approach to pension valuation freezes the value of the pension at the time of marriage breakdown and values it as if the member terminated employment on that date, thereby ignoring, for the most part, post-separation increases in value.

⁷¹ *Supra*, note 1, s. 65(3).

⁷² Ontario, Ministry of Financial Institutions (now Ministry of Finance), *Building on reform: Choices for tomorrow's pensions* (March 1989), at 80-82.

⁷³ Sheryl Smolkin and Janet Downing, *Family Law: Voodoo Economics for Women[:]* *Pension Credit-Splitting Pitfalls* (January 29, 1993) (paper prepared for 1993 Institute of Continuing Legal Education, Canadian Bar Association—Ontario), at 31.

⁷⁴ See *Pension Benefits Act* (Ont.), *supra*, note 1, s. 51.

⁷⁵ See *supra*, ch. 5.

In devising a scheme for benefit splits, the Commission is faced with the same issue. Should a termination approach or a retirement approach be adopted? A termination approach would result in the creation of two separate pensions in the plan at the time of marriage breakdown. A retirement approach would result in the split being deferred until the time of retirement, and the creation of two separate pensions in the plan at that time.

A termination approach to benefit splits essentially treats the non-member spouse as a terminated member with a deferred pension.⁷⁶ This approach is quite familiar to plan administrators. It effectively separates the interests of the parties at the time of marriage breakdown, providing a deferred pension to the non-member spouse. Once the pension is divided in this manner, the non-member spouse's interest is not affected by the death or termination of the member spouse. Schemes that adopt a termination approach and freeze the interests of the non-member spouse at the time of marriage breakdown are referred to as "account splits" or "credit splits".

A termination approach in the form of an account split has been adopted in the federal *Pension Benefits Standards Act, 1985*.⁷⁷ Under that legislation, the pension is valued at the time of marriage breakdown as if the member has terminated employment and opted for a deferred pension payable at a later date. An amount equal to the non-member spouse's share of the pension value accrued during the marriage is transferred to a separate account in the same pension plan in the name of the non-member spouse. The amount in the separate account is then available to provide for a periodic payment to the non-member spouse at a later date. The value of the pension benefit in the separate account is not subject to growth arising from any post-separation benefit accruals due to salary increases, increases in credited service, or plan improvements, but may be subject to indexing after termination if this is a term of the pension plan. The non-member spouse receives a right to a pension at some time in the future based on his or her own separate account. The non-member spouse is treated as a former member of the plan and is entitled to the same options and ancillary benefits as the former member.⁷⁸

The termination approach in the form of a credit split was recommended in the 1989 report of the Ontario Ministry of Financial Institutions.⁷⁹ The report recommended that the member spouse have the right to convey to the non-member spouse a portion of his or her pension benefit at the time of marriage

⁷⁶ See *Pension Benefits Act* (Ont.), *supra*, note 1, ss. 36, 37.

⁷⁷ *Supra*, note 69, s. 25(4).

⁷⁸ *Ibid.*

⁷⁹ *Supra*, note 72.

breakdown. The non-member spouse would be treated as a member who has terminated employment and opted for a deferred pension. The Ministry preferred this approach because it would result in a complete separation of the interests of the two parties at the time of marriage breakdown, with the interest of the non-member spouse not being affected by the death, termination of employment, or remarriage of the member spouse.⁸⁰

The current system for dividing Canada Pension Plan benefits is also based on a termination approach. On marriage breakdown, under the credit-splitting provisions of the *Canada Pension Plan*,⁸¹ all unadjusted pensionable earnings of either spouse during the eligible years of cohabitation are added together, with one-half of the total being credited to the Canada Pension Plan on account of each spouse. This calculation is based on the date of marriage breakdown.

Several provinces have adopted a retirement approach to benefit splits. One example is found in the provisions of the British Columbia *Family Relations Act*.⁸² The legislation is based on recommendations made by the Law Reform Commission of British Columbia.⁸³ Under that legislation, in the case of a defined benefit plan the parties can opt for a "separate pension"⁸⁴ as a means of dividing the pension on marriage breakdown. The non-member spouse is required to wait until the member retires to receive a share of the pension administered by the plan, and is entitled to a proportionate share of all "benefits" available under the pension plan,⁸⁵ as determined on the date that the pension commences.⁸⁶

Saskatchewan, Prince Edward Island, and Nova Scotia have also taken a retirement approach to benefit splits. The Saskatchewan *Pension Benefits Act*,

⁸⁰ *Ibid.*, at 88.

⁸¹ R.S.C. 1985, c. C-8, s. 55.2(5), as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23; am. S.C. 1991, c. 44, s. 8(1). For a more detailed discussion of these provisions, see *infra*, ch. 8.

⁸² *Supra*, note 39, Part 3.1, as en. by S.B.C. 1994, c. 6, s. 8.

⁸³ Law Reform Commission of British Columbia, *Report on the Division of Pensions on Marriage Breakdown* (Report No. 123) (Vancouver: Ministry of Attorney General, January 1992) (hereinafter referred to as "B.C. Report No. 123"). The proposed legislation set out in B.C. Report No. 123 is reproduced *infra*, Appendix D.

⁸⁴ *Family Relations Act* (B.C.), *supra*, note 39, s. 55.5(b), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 83, at 82-84.

⁸⁵ *Family Relations Act* (B.C.), *supra*, note 39, ss. 55.3(2)(a), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 83, at 70, 80.

⁸⁶ *Family Relations Act* (B.C.), *supra*, note 39, s. 55.5(b), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 83, at 97.

1992⁸⁷ provides that in the case of a defined benefit plan where a member is entitled to an unreduced pension, the non-member spouse can opt for a division when the pension becomes payable. Similarly, Prince Edward Island⁸⁸ and Nova Scotia⁸⁹ legislation provides that a non-member spouse is entitled to payment of a pension based on a division of the pension commencing on the earlier of the normal retirement date or the actual retirement date of the member.

The current provisions of the Ontario *Pension Benefits Act*⁹⁰ concerning plan-administered "if and when" arrangements also take a retirement approach. Under those provisions, "if and when" arrangements take effect on the earlier of the actual retirement date or the normal retirement date. On that date, the plan administrator is required to pay a portion of the periodic pension benefit to the non-member spouse.

On consideration of the termination and retirement approaches to benefit splits, the Commission has selected the retirement approach. This preference is consistent with the Commission's recommendations concerning valuation set out in chapter 5 of this report. For a variety of reasons, those recommendations favour a retirement approach for pension valuation purposes under the *Family Law Act*. In our view, the adoption of a retirement approach for a benefit split is the more attractive alternative for many of the same reasons.⁹¹ In addition, using the value of the pension at retirement to satisfy the more general equalization payment provides a larger pool of resources to the member spouse to satisfy an equalization obligation. It also ensures that the value placed on the pension for *Family Law Act* equalization purposes will be satisfied through pension division at source.

7. FIFTY-PERCENT RULE

With the exception of the federal government in the *Pension Benefits Standards Act, 1985*,⁹² all Canadian jurisdictions that have passed legislation providing for pension division at source have enacted what is generally referred

⁸⁷ *Supra*, note 35, s. 47(3).

⁸⁸ *Pension Benefits Act* (P.E.I.), *supra*, note 65, s. 60(4).

⁸⁹ *Pension Benefits Act* (N.S.), *supra*, note 27, s. 61(4).

⁹⁰ *Supra*, note 1, s. 51.

⁹¹ For example, the retirement approach is viewed by the Commission as the more desirable approach because it is a more accurate indicator of the value of the pension accrued during the marriage. See *supra*, ch. 5.

⁹² *Supra*, note 69.

to as a "fifty-percent rule". For example, legislation in Manitoba,⁹³ New Brunswick,⁹⁴ Nova Scotia,⁹⁵ Prince Edward Island,⁹⁶ and Quebec,⁹⁷ and the federal *Pension Benefits Division Act*,⁹⁸ provide for a fifty-percent rule.

While there are various formulations of the fifty-percent rule, it essentially operates to prohibit a member spouse from assigning more than one-half of the value of the pension benefit to his or her non-member spouse on marriage breakdown. This ensures that the member retains at least one-half of the pension benefit for his or her own retirement income. A fifty-percent rule is included in the current regime for plan-administered "if and when" arrangements under the Ontario *Pension Benefits Act*. Section 51(2) of that Act provides that the non-member spouse is entitled to no "more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses".⁹⁹

Two issues must be considered with respect to a fifty-percent rule. Is it worth retaining a fifty-percent rule and, if so, how should it be calculated? The Commission's view is that a fifty-percent rule is desirable and should be retained in our recommended scheme for pension division at source. A fifty-percent rule reinforces the objectives of most employers in establishing pension plans, objectives that are consonant with the public interest in these matters. Pension plans are introduced by employers as part of employees' compensation packages. Participation in a plan over a number of years results in a retirement benefit to employees that eliminates or reduces the need to provide otherwise for their retirement years. If an assignment of one hundred percent of the pension benefits

⁹³ See The Pension Benefits Act Regulations (Man.), *supra*, note 15, s. 24(3).

⁹⁴ See *Pension Benefits Act* (N.B.), *supra*, note 33, s. 44.

⁹⁵ See *Pension Benefits Act* (N.S.), *supra*, note 27, s. 61.

⁹⁶ See *Pension Benefits Act* (P.E.I.), *supra*, note 65, s. 60.

⁹⁷ See *Supplemental Pension Plans Act*, *supra*, note 67, ss. 85, 110.

⁹⁸ *Supra*, note 64, s. 8.

⁹⁹ While the precise method of valuation for the purposes of determining a violation of the fifty-percent rule is not prescribed, regulations made under the *Pension Benefits Act* (Ont.), *supra*, note 1, provide some guidance. Section 56 of the regulations under the *Pension Benefits Act*, R.R.O. 1990, Reg. 909, provides as follows:

56. For purposes of subsection 51(2) of the Act, the pension benefits accrued during the period a member had a spouse shall be determined as if the member terminated employment at the valuation date in accordance with the terms of the plan at that date and without consideration of future benefits, salary or changes to the plan but with consideration for the possibility of future vesting.

were allowed on marriage breakdown, the reasons for employers providing pension benefits would be undermined.¹⁰⁰ Employers might also find it difficult to retire members who have assigned their entire pension.

The Commission is aware that retaining a fifty-percent rule may complicate the *Family Law Act* equalization process by restricting the ability of the parties to enter into agreements that assign a larger portion of the pension asset. However, in the Commission's view, the preservation of a portion of retirement income for the member spouse is the more important policy objective. Any potential interference with the ability of the parties to design agreements that suit their individual circumstances is justifiable on that basis.

The Commission is not, however, satisfied with the calculation of the fifty-percent rule found in the *Pension Benefits Act* for plan-administered "if and when" arrangements.¹⁰¹ The current formulation is deficient in several respects. Under this rule, the value of the pension asset for determining a violation of the rule is calculated as if the member had terminated employment on the date of marriage breakdown. Only fifty percent of the termination value of the pension is available for distribution. This creates difficulties because "if and when" arrangements created under current law are based on a retirement approach and involve splitting the pension benefit on the pension commencement date.

In the report of the Ontario Ministry of Financial Institutions,¹⁰² the formulation of the rule found in section 51(2) of the *Pension Benefits Act* was criticized and its abolition recommended:

The value of some types of pensions, notably pensions in final average plans, can increase substantially as the plan member nears the final few years of membership, an increase which applies retroactively to all accrued benefits. As a result, the value of the pension as determined at the date of the separation, (often referred to as the 'termination' valuation method), and hence the amount of the pension that can be shared between spouses in the settlement, may be fairly low in comparison with the projected value at retirement, adjusted to take into account the length of the marriage as a proportion of the number of years of plan membership (often referred to as the 'retirement' method of valuation). In effect, the value at the date of separation may not fairly represent the ultimate value of the pension. It may therefore be appropriate, in some circumstances, to permit the spouses to share more than 50%

¹⁰⁰ Campbell and Merker, *supra*, note 70, at 16-17.

¹⁰¹ *Supra*, note 1, s. 51(2). These issues do not arise with respect to pension division at source in the form of a transfer. In that case, only a termination or commuted value is available for transfer out of the plan. The application of the fifty-percent rule results in one-half of the termination value being available to be transferred out of the plan.

¹⁰² *Supra*, note 72, at 84.

of the pension to compensate for the fact that the termination value may not be a true representation of the value of the pension to the member.

The fifty-percent rule proposed by the Commission seeks to correct the deficiencies of the current rule by applying a retirement approach, as opposed to a termination approach, to the formulation of the rule. One-half of the total value of the pension at the date of retirement will be available to satisfy an equalization payment.¹⁰³ This formulation applies to the total value of the pension asset, including pension benefits accrued before the marriage began and after it ended.¹⁰⁴

While the Commission believes that the fifty-percent rule should be retained for pension division-at-source purposes, we also recognize that there may be instances where the fifty-percent rule may create hardship for the non-member spouse, particularly where there are no other means of satisfying an equalization payment. For example, where the member's only remaining asset in the jurisdiction is a pension and where the member is otherwise avoiding or unable to meet his or her obligation to make an equalization payment, it may be

¹⁰³ The position taken by the Commission with respect to the calculation of the fifty-percent rule is similar to that found in the *Family Relations Act* (B.C.), *supra*, note 39, s. 55.92(1)(a), as en. by S.B.C. 1994, c. 6, s. 8:

55.92—(1) A spouse may enter into a written agreement with a member respecting ...

- (a) if there has been no division of a pension between the member and spouse, an arrangement for sharing the pension which departs from the proportionate shares required under this Act provided that the share to the spouse leaves the member with at least half of
 - (i) the value the pension would have had, or
 - (ii) the periodic benefits that would have been paid under the pension on retirement.

The rule adopted in the British Columbia legislation refers to fifty percent of the total pension benefit at the early retirement date or the actual retirement date, and not to the accruals during the marriage.

See, also, B.C. Report No. 123, *supra*, note 83, at 89. The Law Reform Commission of British Columbia commented in making its recommendation that “[i]t would run counter to social policy to allow a member to convey all, or substantially all, of the pension as a means of settling family property rights”: *ibid.*

¹⁰⁴ The fifty-percent rule under s. 51(2) of the *Pension Benefits Act* (Ont.), *supra*, note 1, should be distinguished from the rule found in s. 39(3), where, in a contributory defined benefit plan, the employer must pay for at least fifty percent of the value of the pension benefit earned or granted on or after January 1, 1987. The test is applied at the earliest of the member's termination of employment, death, or retirement (although on retirement, “excess contributions” are not generally produced). To the extent that the plan member has paid for more than half the value of the pension, his or her contributions are refunded: *ibid.*, s. 39(4). These are known as “excess contributions”. The “excess contribution” calculation will be made when the member spouse terminates employment.

appropriate to make available more than fifty percent of the pension asset for equalization purposes. Similarly, where a non-member spouse, unknowingly in violation of the fifty-percent rule, makes an agreement to settle for more than fifty percent of the pension asset and gives up an opportunity to settle for other valuable consideration, it may be fair to enforce the agreement, notwithstanding the violation of the fifty-percent rule.

In order to provide a remedy to the non-member spouse in these circumstances, the non-member spouse will be entitled to apply for a court order that more than fifty percent of the pension asset be transferred or paid to the benefit of the non-member spouse in settlement of an equalization claim. The application will be on notice to the member spouse and the pension plan. A variation will be granted where imposition of the fifty-percent rule is "demonstrably unjust" in the existing circumstances. In determining whether to waive the fifty-percent rule, the courts will be required to balance the need to satisfy the equalization payment and the desirability of preserving the pension asset for both spouses.¹⁰⁵

On an application involving a transfer in excess of fifty percent of the value of the pension, the court will be required to consider the effect of such a division on the solvency of the pension plan. The plan administrator is in the best position to demonstrate that a transfer will violate the solvency requirements of the *Pension Benefits Act* and should bear the onus of doing so.¹⁰⁶ The court will also be required to ensure that the transfer will not result in the member being left in a

¹⁰⁵ The "demonstrably unjust" standard can be compared to the unconscionability standard set out in s. 5(6) of the *Family Law Act* (Ont.), *supra*, note 3, which varies an equal sharing of property on marriage breakdown, in that the "demonstrably unjust" standard is a less severe test. For a discussion of the unconscionability standard, see Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: Ministry of Attorney General, 1993), at 59 (hereinafter referred to as "*Report on Family Property Law* (1993)").

¹⁰⁶ *Supra*, note 1, s. 42(7) and regulations, *supra*, note 99, s. 19(4)-(9), as am. by O. Reg. 712/92, s. 14. Currently, under the *Pension Benefits Act* (Ont.), prior to any transfer out of the fund the administrator must ensure that the transfer will not impair the solvency of the fund. This should also apply to a transfer on marriage breakdown.

In *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*, Report No. 48 (Edmonton: June 1986), Recommendation No. 9, at 23 (hereinafter referred to as "Alta. Report No. 48"), the Alberta Institute of Law Research and Reform (now Alberta Law Reform Institute) adopted the following approach to determining whether a transfer of more than fifty percent of the pension value out of the plan would impair the solvency of the plan:

We recommend that the certificate of a pension plan administrator that a valuation and division of an employee spouse's pension benefit would prejudice the liquidity or the solvency of the pension fund be proof of the truth of its contents in the absence of evidence to the contrary and that it not be overridden unless the pension plan administrator has been given notice of an application for that purpose and has had an opportunity to give evidence and be heard.

negative pension position—that is, actually owing money to the pension plan. The legal onus should be placed on the member to produce evidence demonstrating that a transfer of more than fifty percent of the pension would result in the member being left in a negative position.

The Commission recommends that the proposed pension division-at-source legislation should provide that

- (a) in the case of the transfer of a lump sum out of a pension plan, no more than fifty percent of the value of the pension determined at the time of separation should be available for payment to a non-member spouse;
- (b) in the case of the benefit split of a periodic pension payment, no more than fifty percent of the value of the pension determined at the time of retirement should be available for payment to a non-member spouse;
- (c) either spouse may apply to court to assign more than fifty percent of the value of the pension on a transfer or benefit split, on giving notice to the plan administrator and to the other spouse;
- (d) a court may vary the fifty-percent rule on such an application where the imposition of the fifty-percent rule would be “demonstrably unjust” in the circumstances of the case; and
- (e) on an application to court to vary the fifty-percent rule, the court should consider whether a transfer in excess of the rule would violate section 42(2) of the *Pension Benefits Act* regarding solvency standards for transfers out of the pension plan where that issue is raised by the plan administrator.

8. RIGHT TO PENSION DIVISION AT SOURCE OUTSIDE MARRIAGE BREAKDOWN

Spouses under the *Family Law Act* are entitled to an equalization of family assets in two circumstances outside marriage breakdown: on the death of one of the spouses, and where one party is depleting the family assets to the detriment of the other spouse.¹⁰⁷ The Commission has considered whether our proposals for pension division at source should be available in either of these circumstances.

¹⁰⁷ *Family Law Act* (Ont.), *supra*, note 3, s. 5(3).

(a) PENSION DIVISION ON DEATH

A surviving spouse has the option, on the death of his or her spouse, to accept the terms of the will of the deceased spouse or to elect for an equalization of family assets under the *Family Law Act*.¹⁰⁸ The reasoning behind the election is that the surviving spouse should be at least as well off on the death of his or her spouse as he or she would be on the breakdown of the marriage. Section 4(1) of the *Family Law Act* defines the "valuation date" for the purpose of determining equalization payments as being the earliest of five dates, including "[t]he date before the date on which one of the spouses dies leaving the other spouse surviving".

In the Commission's view, pension division at source, or more specifically an immediate benefit split, should not be available on the death of a spouse.¹⁰⁹ Allowing pension division at source where the surviving spouse exercises an election under section 6(1) of the *Family Law Act* would pose an unnecessary financial and administrative burden on the pension plan. This is particularly so because on the death of a member spouse, the pension plan normally has no further obligation to make periodic payments on behalf of the member.

The Commission recommends that the proposed pension division-at-source legislation should provide that where one of two spouses dies, and where the surviving spouse has elected equalization under section 6 of the *Family Law Act*, the surviving spouse should not be entitled to pension division at source to satisfy an equalization obligation.

(b) PENSION DIVISION TO PREVENT IMPROVIDENT DEPLETION

The Commission believes that pension division at source should be available to the non-member spouse as a settlement option where an application is made pursuant to section 5(3) of the *Family Law Act* to prevent improvident depletion. Under that provision, a spouse may apply during a period of cohabitation to a court under section 7 of the *Family Law Act* for equalization of net family properties if there is a serious danger of the other spouse

¹⁰⁸ *Ibid.*, s. 6.

¹⁰⁹ See the *Report on Family Property Law* (1993), *supra*, note 105, at 146, where the Commission recommended that the valuation date be changed to the time immediately after death:

11. Clause 5 of the definition of "valuation date" in section 4(1) of the *Family Law Act* should be amended to provide that when one spouse dies and is survived by the other, the valuation date is the date of death, and the time of valuation is immediately after death.

improvidently depleting his or her net family property. In this situation, it may be the case that few family assets are remaining other than the pension.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an application to prevent improvident depletion under section 5(3) of the *Family Law Act*, pension division at source be available to satisfy an equalization obligation.

9. TYPES OF PENSIONS SUBJECT TO PENSION DIVISION-AT-SOURCE SCHEME

Pensions in Ontario fall under federal or provincial jurisdiction. There are a number of types of federal and provincial pensions, including defined contribution plans, defined benefit plans, and hybrid plans, that may be in different stages of development—vested, unvested, deferred, unmatured, or matured. It is necessary, therefore, to consider which of these should be included in a new pension division-at-source scheme. The Commission has also considered the status of life income funds and locked-in retirement accounts under our proposals.

(a) PROVINCIAL PENSIONS

The scheme proposed by the Commission in this report will apply to pensions subject to provincial jurisdiction. This includes pensions registered under section 6 of the *Pension Benefits Act*,¹¹⁰ as well as plans covering members employed by the province (for example, plans created pursuant to provincial legislation for public employees).¹¹¹ Also included are plans subject to the *Pension Benefits Act* because of a “reciprocal transfer agreement”.¹¹²

¹¹⁰ *Supra*, note 1.

¹¹¹ *Ibid.*, s. 3. Also included in this category are plans under the following Acts: *Teachers' Pension Act*, R.S.O. 1990, c. T.1; *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, c. O.29; *Legislative Assembly Retirement Allowances Act*, R.S.O. 1990, c. L.11; and *Public Service Pension Act*, R.S.O. 1990, c. P.48; and Provincial Court Judges' pensions created under O. Reg. 67/92, *Salaries and Benefits of Provincial Judges, Part II—Pensions and Survivor Allowances*, made under the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

¹¹² “Reciprocal transfer agreement” is defined in the *Pension Benefits Act* (Ont.), *supra*, note 1, s. 1, as:

an agreement related to two or more pension plans that provides for the transfer of money or credits for employment or both in respect of individual members.

(b) DEFERRED PENSIONS

"Deferred pension" is defined in the *Pension Benefits Act*¹¹³ as "a pension benefit, payment of which is deferred until the person entitled to the pension benefit reaches the normal retirement date under the pension plan". Deferred pensions are available under the *Pension Benefits Act* in three circumstances.¹¹⁴ On termination of employment, where the member's pension has vested, he or she is entitled to receive a deferred pension commencing at the early retirement date.¹¹⁵ On the wind-up or termination of a plan, a member spouse has the option of a deferred pension where he or she has not yet reached retirement.¹¹⁶ And where a member or former member is vested and dies before the commencement of his or her pension, the surviving spouse is entitled to receive a death benefit in the form of a deferred pension.¹¹⁷

The Commission has concluded that deferred pensions should be included in our scheme for pension division at source. A deferred pension is an important family asset that should be available to satisfy an equalization payment. The division of a deferred pension is currently available in Ontario under section 51 of the *Pension Benefits Act* for plan-administered "if and when" arrangements.¹¹⁸ We can see no reason to depart from this practice.

(c) UNVESTED PENSIONS

In Ontario, the vesting of pensions is determined in accordance with plan rules and the provisions of the *Pension Benefits Act*. There are two statutory vesting rules for pensions. For benefits earned on or after January 1, 1965, but prior to January 1, 1987, the interest of members must vest if they have completed ten years of continuous employment or ten years of plan membership, and have attained the age of forty-five. For benefits earned on or after January 1, 1987, members must have completed twenty-four months of continuous plan membership.¹¹⁹ Where a member is vested, the member's pension benefit is

¹¹³ *Ibid.*, s. 1.

¹¹⁴ *Ibid.*, ss. 37, 42, 48, 72.

¹¹⁵ *Ibid.*, s. 37.

¹¹⁶ *Ibid.*, s. 72.

¹¹⁷ *Ibid.*, s. 48(1).

¹¹⁸ The *Pension Benefits Act* (Ont.), *ibid.*, s. 51(3), refers to the "payment of a pension or a deferred pension".

¹¹⁹ *Ibid.*, ss. 1 "qualification date", 36, 37.

locked in if the member terminates employment and, therefore, plan membership.¹²⁰ If a member terminates membership and is not statutorily vested under the pre-1987 vesting provisions or the post-1986 rules, the member is entitled on termination of employment to a return of his or her contributions plus interest.¹²¹ It is the Commission's view that unvested pensions should be subject to division at source in the form of a transfer.¹²² Restricting pension division at source to a transfer mirrors the scheme under the *Pension Benefits Act*, where the obligation of the plan administrator with respect to payment out of the fund when an unvested member terminates employment is limited to cash payments and no periodic benefit is payable.¹²³

In situations where the twenty-four month vesting rules apply and the vesting requirements of the *Pension Benefits Act* have not been met, the non-member spouse may wish to wait until the pension is vested before electing pension division at source, provided that vesting occurs within the time limits set out in the *Family Law Act*.¹²⁴ In this way, the member may have access to a larger pension value to satisfy an equalization payment. Although this conduct might, in a particular case, delay settlement, access to a larger pension value may be in the interests of both parties and we see no reason, therefore, to attempt to proscribe such conduct.

(d) HYBRID PENSIONS

A hybrid pension plan has features of both a defined benefit plan and a defined contribution plan. The Commission includes such plans in our pension division-at-source scheme, and endorses the approach found in the British

¹²⁰ *Ibid.*, s. 63.

¹²¹ *Ibid.*, s. 63(3), (4).

¹²² The Alberta Institute of Law Research and Reform recommended that unvested pensions not be subject to division, but that a non-member spouse have the option of proceeding to court for an order directing pension division at source in the form of a transfer, based on a contributions-plus-interest formula. See Alta. Report No. 48, *supra*, note 106, Recommendation No. 18, at 41, where it is recommended that:

(2) if a valuation and accounting would not be just and equitable because the vesting of the employee spouse's pension benefit is unduly delayed, the Court be given power to order that the pension benefit be divided by division of proceeds either by the pension plan administrator or by the employee spouse.

¹²³ *Pensions Benefits Act* (Ont.), *supra*, note 1, s. 63(1), and regulations, *supra*, note 99, s. 59.

¹²⁴ *Supra*, note 3, s. 7(3).

Columbia *Family Relations Act*, which is to divide the plan by components.¹²⁵ Where the terms of a pension plan allow a member to choose a pension based on either a contribution or a benefit formula, the plan is valued and divided as if it is a defined contribution plan. Where the member is not entitled to a choice, the hybrid plan is treated as a defined contribution plan to the extent that the hybrid pension is based on principles applicable to a defined contribution plan, with the remainder of the pension being divided as if it were a defined benefit plan. Where the options in the legislation are inappropriate, the court is authorized to select another method of dividing a plan. The court order is then binding on the plan.¹²⁶

Adopting these or similar proposals will bring some certainty to the treatment of hybrid pension plans on marriage breakdown in Ontario. In our view, the precise method by which hybrid plans are to be divided at source should be prescribed by regulation, provided that the parties may apply to the court for an order directing an appropriate method of division of the plan where, because of the terms of the particular plan, the prescribed method is inappropriate.

(e) DIVISION OF LIRAS AND LIFs

The *Pension Benefits Act* provides that, in prescribed circumstances, members are entitled to transfer the commuted value of their pension entitlement from the pension plan to a prescribed retirement savings arrangement, a locked-

¹²⁵ The *Family Relations Act* (B.C.), *supra*, note 39, s. 55.6(1), as en. by S.B.C. 1994, c. 6, s. 8, provides the following:

55.6—(1) If a pension to be divided is in a local plan and not yet matured and the plan is a hybrid plan,

- (a) to the extent that the pension in the hybrid plan is based on, or the member may choose to have it based on, principles applicable to a defined contribution plan, the pension must be divided in accordance with this Part and the regulations as if it were in a defined contribution plan, and
- (b) the remainder of the pension must be divided in accordance with this Part and the regulations as if the pension were in a defined benefit plan.

(2) If, in the circumstances, the method of division required under this Part and the regulations is inappropriate because of the terms of the plan, the Supreme Court may, despite the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting pension entitlement of the member and the spouse on marriage breakdown, direct an appropriate method of division of the pension and the order of the court is binding on the plan.

See, also, B.C. Report No. 123, *supra*, note 83, at 92.

¹²⁶ B.C. Report No. 123, *ibid.*, at 92-93.

in annuity, or another pension plan with the permission of the transferee plan.¹²⁷ Prescribed retirement savings arrangements are defined in the regulations and include life income funds (LIFs) and locked-in retirement accounts (LIRAs).¹²⁸ The regulations promulgated under the *Pension Benefits Act* contain provisions regarding the regulation of LIFs and LIRAs.

A LIF is a prescribed pension arrangement that can be purchased with locked-in pension funds. The LIF contract must be registered pursuant to the *Income Tax Act*.¹²⁹ The fund is locked in and cannot be withdrawn in a lump sum. The owner of the contract is paid income each year for life (except that the owner can choose whether or not to receive income in the first year). The owner can determine the amount of income to be paid out of the fund each year, subject to minimum and maximum withdrawal rules. The owner of the contract must purchase a life annuity with the balance of the money in the LIF by the end of the year in which the owner reaches the age of eighty.¹³⁰

A LIRA is an RRSP with certain contractual conditions. For example, the money must be locked in and must be used to provide a pension. A LIRA is generally non-assignable and exempt from seizure. The pension under a LIRA is usually payable at age fifty-five, or at an earlier age if permitted by the pension plan from which the money was transferred.¹³¹

The Commission believes that LIFs and LIRAs should be subject to its pension division-at-source scheme. The financial institution holding the LIF or LIRA will be obliged to transfer money out of the funds. The administrator of the plan from which the money originated should have no obligation on division except to provide information to the parties if necessary.

Pension division at source for LIFs and LIRAs should, in the Commission's view, be in the form of a transfer rather than a benefit split. The Commission makes this recommendation despite current legislation that provides for what is

¹²⁷ *Supra*, note 1, s. 42(1).

¹²⁸ Regulations under the *Pension Benefits Act* (Ont.), *supra*, note 99, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

¹²⁹ R.S.C. 1952, c. 148 (as subsequently re-en. by S.C. 1970-71-72, c. 63). See regulations under the *Pension Benefits Act* (Ont.), *supra*, note 99, s. 21(5), as am. by O. Reg. 409/94, s. 3(6).

¹³⁰ Regulations under the *Pension Benefits Act* (Ont.), *ibid.*, Schedule 1, ss. 4, 7, as en. by O. Reg. 564/92, s. 3.

¹³¹ *Ibid.*, s. 21(2), (2.1), as am. by O. Reg. 409/94, s. 3(2)-(5). See, also, Saskatchewan Justice, Pension Benefits Branch, *Division of Pension Benefits on Marriage Breakdown* (Regina: October 1994), at 17.

essentially a benefit split of a LIF. Schedule 1 to the regulations under the *Pension Benefits Act* provides for the division of the income stream out of a LIF.¹³² The Commission finds the approach of dividing the income stream out of LIFs and LIRAs to be undesirable. Placing an obligation on financial institutions to divide the income stream from LIFs and LIRAs is too onerous.

(f) RECOMMENDATIONS FOR REFORM

The Commission recommends that the proposed pension division-at-source legislation should apply to the following:

- (a) pensions established by or under Ontario legislation;
- (b) pensions registered under the *Pension Benefits Act*;
- (c) pensions subject to reciprocal transfer agreements to the extent that such agreements cover Ontario employees and are administered in accordance with the *Pension Benefits Act*;
- (d) deferred pensions as defined in the *Pension Benefits Act*;
- (e) unvested pensions as defined in the *Pension Benefits Act*, but only in the form of a transfer;
- (f) hybrid plans on the following basis:
 - (i) to the extent the pension plan is based on principles applicable to defined contribution plans, the plan should be divided in accordance with the recommendations set out in this report governing the division of defined contribution plans;
 - (ii) to the extent the pension plan is based on principles applicable to defined benefit plans, the plan should be divided in accordance with recommendations set out in this report governing the division of defined benefit plans; and
 - (iii) a hybrid plan should be divided in accordance with a court order authorizing an appropriate method of division that is binding on

¹³² Regulations under the *Pension Benefits Act* (Ont.), *supra*, note 99, Schedule 1, s. 4(4), as en. by O. Reg. 564/92, s. 3:

(4) Payments out of a life income fund are subject to division in accordance with the terms of a domestic contact as defined in Part IV of the *Family Law Act* or the terms of an order made under Part I of that Act.

the plan administrator, where the plan administrator is unable to divide the hybrid plan in accordance with the recommendations set out in this report;

and

- (g) life income funds (LIFs) and locked-in retirement accounts (LIRAs), but only in the form of a transfer.

10. DEFINITION OF SPOUSE

Currently, only married couples are included in the definition of "spouse" under Part I of the *Family Law Act*.¹³³ In an earlier report, the Commission suggested that the definition be amended to include cohabiting couples, as well as same-sex couples, in certain circumstances.¹³⁴ In principle, we would

¹³³ *Supra*, note 3, s. 1:

'Spouse' means either of a man and woman who,

- (a) are married to each other, or
- (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

¹³⁴ In its *Report on Cohabitants* (1993), *supra*, note 12, at 70-71, the Commission recommended that:

- 3. (1) Legislation should be enacted to establish a system permitting the registration of Registered Domestic Partnerships.
- (2) Subject to paragraph (3) below, any two persons should be permitted to become Registered Domestic Partners upon filing a witnessed and signed registration form.
- (3) Individuals should be permitted to become Registered Domestic Partners, provided that they are,

. . . .

- (a) not married, or the Registered Domestic Partner of another; and
- (b) at least eighteen years of age.
- (4) Where one or both of the persons entering into a Registered Domestic Partnership have failed to comply with the requirements contained in recommendation 3(3), the Registered Domestic Partnership should be void.
- (5) A Registered Domestic Partner should be entitled to revoke the registration unilaterally, upon giving notice to the other partner.

. . . .

recommend that all cohabitants subject to equalization under our proposed amendments to the *Family Law Act* should also be entitled to pension division at source. It must be noted, however, that the inclusion of same-sex couples in a pension division-at-source scheme gives rise to difficulty because same-sex couples are not currently contemplated by the definition of spouse in the *Pension Benefits Act*,¹³⁵ which is tied in part to the definition of spouse in the federal *Income Tax Act*.¹³⁶ The *Income Tax Act* does not permit pension plans to provide survivor benefits to same-sex partners of plan members. If a provincial pension plan extends these benefits to same-sex partners, it loses its registration status under the *Income Tax Act*.¹³⁷ As the Commission does not wish to jeopardize the

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6. For the purposes of recommendation 1, the definition of "spouse" contained in section 1(1) of the *Family Law Act* should be amended to include either of a man and woman who are not married to each other and have cohabited:

- (a) continuously for a period of not less than three years [or some other period of time prescribed by statute], or
- (b) in a relationship of some permanence, if they are the parents of a child.

¹³⁵ The *Pension Benefits Act* (Ont.), *supra*, note 1, s. 1, reads as follows:

'spouse' means either of a man and woman who,

- (a) are married to each other, or
- (b) are not married to each other and are living together in a conjugal relationship,
 - (i) continuously for a period of not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*.

¹³⁶ The definition of "spouse" in the *Income Tax Act*, *supra*, note 129, s. 252(4)(a), as en. by S.C. 1993, c. 24, s. 140(3); am. by 1994, c. 21, s. 112, is restricted to opposite-sex partners:

252.—(4)(a) words referring to a spouse at any time of a taxpayer include the person of the opposite sex who cohabits at that time with the taxpayer in a conjugal relationship and

- (i) has so cohabited with the taxpayer throughout a 12-month period ending before that time, or
- (ii) is a parent of a child of whom the taxpayer is a parent (otherwise than because of the application of subparagraph (2)(a)(iii)),

and, for the purposes of this paragraph, where at any time the taxpayer and the person cohabit in a conjugal relationship, they shall, at any particular time after that time, be deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

¹³⁷ *Ibid.*, s. 252(4), as en. by S.C. 1993, c. 24, s. 140(3); am. by 1994, c. 21, s. 112.

registration of provincial pension plans for tax purposes, the extension of pension division at source to same-sex partners should await the making of necessary amendments to the *Pension Benefits Act* and the *Income Tax Act*.

The Commission recommends that the proposed pension division-at-source legislation should apply to the pensions of cohabitants in accordance with the recommendations made by the Ontario Law Reform Commission in its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), provided that parallel amendments are made to the Ontario *Pension Benefits Act* and the federal *Income Tax Act*.

11. STATUTORY LOCATION OF SCHEME

The Commission has considered whether its proposed pension division-at-source scheme should be enacted as an independent statute or as an amendment to an existing statutory scheme. If the latter approach is to be taken, there are two likely statutory candidates for the inclusion of such a scheme—the *Family Law Act*¹³⁸ and the *Pension Benefits Act*.¹³⁹ There are good arguments for including the Commission's proposals in either of these Acts, rather than in a free-standing statute. Inclusion in the *Family Law Act* is desirable because it would make pension division-at-source provisions more accessible to family lawyers. On the other hand, inclusion in the *Pension Benefits Act* is desirable because that Act contains a framework for dealing with pension matters, as well as a means of

In August 1992, the Ontario Human Rights Commission ruled that survivor benefits should be extended to same-sex couples in the context of the Public Service Pension Plan: see *Leshner v. Ontario* (No. 2) (1992), 16 C.H.R.R. D/184, 92 C.L.L.C. ¶7,035 (Ont. Hum. Rts. Bd. of Inquiry), which is discussed in more detail in the Ontario Law Reform Commission's *Report on Cohabitants*, *supra*, note 12, at 34. As a result of that case and the provisions of the *Income Tax Act*, the Ontario government was ordered to make a parallel arrangement to provide for survivor benefits for same-sex couples who would not otherwise fall within the definition of "spouse" in the *Pension Benefits Act* (Ont.), *supra*, note 1.

In this case, the province was also directed to make representations to the federal government within three years requesting amendment of the *Income Tax Act* to provide for pension benefits to same-sex couples. At present, however, there is no requirement that plans (including the Public Service Pension Plan) be amended to provide for same-sex benefits; plans that provide for same-sex survivor benefits will not be accepted for registration by the Pension Commission of Ontario, nor will amendments to that effect be accepted: Pension Commission of Ontario, Bulletin B100, 800 (August 31, 1992).

¹³⁸ *Supra*, note 3.

¹³⁹ *Supra*, note 1.

regulation—the Pension Commission of Ontario. Wherever the legislation is to be located, it should provide a complete regime for the division of pensions.¹⁴⁰

The location of the Commission's pension division-at-source scheme has an important implication for its applicability to pensions falling under the federal *Pension Benefits Standards Act, 1985 (PBSA)*.¹⁴¹ The *PBSA* governs private sector pension plans in industries within federal jurisdiction, including banks and interprovincial and international transportation. The *PBSA* incorporates provincial family legislation for the purposes of pension plans falling under the jurisdiction of that Act.¹⁴²

Whether the Commission's proposals could apply to pensions falling under the *PBSA* depends on which Ontario statute implements the Commission's proposals—the *Family Law Act* or the *Pension Benefits Act*. A pension division-at-source scheme authorized by the *Family Law Act* would apply to pensions under the *PBSA* because of the applicability of “provincial property law” to those pensions.¹⁴³ A pension division-at-source scheme contained in the *Pension Benefits Act* would not apply to pensions falling under the *PBSA*, as federal pensions are not subject to the *Pension Benefits Act* because of the definition of “included employment” in section 4(4) of the *PBSA*.

While the Commission declines to make recommendations concerning the appropriate statutory location for its pension division-at-source proposals, if the new legislation is included in the *Family Law Act*, the Commission considers it

¹⁴⁰ The legislative forum for the recommendations found in ch. 5, *supra*, regarding pension valuation for equalization purposes under the *Family Law Act* (Ont.), *supra*, note 3, must be located in that Act. Pension division-at-source regimes in other Canadian provinces are all currently found in pension benefits legislation, except in British Columbia, where they are located in the *Family Relations Act*, *supra*, note 39, Part 3.1, as en. by S.B.C. 1994, c. 6, s. 8. The Alberta Institute of Law Research and Reform recommends, in Report No. 48, *supra*, note 106, Recommendation No. 5, at 16, that its proposed amendments be included in the *Matrimonial Property Act*, R.S.A. 1980, c. M-9.

¹⁴¹ *Supra*, note 69.

¹⁴² The *PBSA*, *ibid.*, s. 25(1), (2) provides as follows:

25.—(1) In this section,

“provincial property law” means the law of a province relating to the distribution, pursuant to court order or agreement between the spouses, of the property of the spouses on divorce, annulment or separation;

....

(2) Subject to this section, pension benefits, pension benefit credits and other benefits under a pension plan shall, on divorce, annulment or separation, be subject to the applicable provincial property law.

¹⁴³ *Ibid.*, s. 25(3).

desirable that it include pensions covered by the *PBSA*, because the *PBSA* does not provide for a deferred benefit split of defined benefit plans. Rather, the account split available under the *PBSA* occurs at the time of the marriage breakdown and is based on a termination approach to valuing the pension.¹⁴⁴ As we have indicated elsewhere in this report,¹⁴⁵ the termination approach to benefit splits is less desirable.

12. ADMINISTRATION FEES

The Commission recognizes that the exercise of rights to pension division at source under our proposed scheme will impose some costs on pension plans. Administrators will be required to undertake additional responsibilities for non-member spouses, such as creating and maintaining records, resulting in an increase in administrative costs. Nonetheless, we are reluctant to impose additional costs on parties to a marriage breakdown and therefore have concluded that no fee should be charged by plans for pension division at source.¹⁴⁶

It may be argued that the result of these proposals will be increased funding costs, requiring increased employer and employee contributions or resulting in a reduction of benefits to members. This may be considered unfair by those members who do not experience marriage breakdown. On the other hand, not all members take advantage of all benefits available under a pension plan (for example, unreduced early retirement benefits or disability pensions). Accordingly, the fact that pension at division at source may only benefit selected members need not, in principle, result in a special fee.

Having due regard to the cost implications of these proposals, however, the Commission has endeavoured to design a pension division-at-source scheme that both protects the interests of non-member spouses and minimizes the administrative burdens and costs imposed on plans. For example, the scheme includes the option of a transfer at the time of marriage breakdown. If this option is taken, any need for the involvement of the plan with the non-member spouse after the date of the transfer is eliminated. Once a transfer takes place, the plan administrator has no further obligation to the non-member spouse. Moreover, the Commission has attempted to develop a framework for pension division at source within existing pension law. For example, we recommend the adoption of the Transfer Value Recommendations developed by the Canadian Institute of

¹⁴⁴ *Ibid.*, s. 25(4).

¹⁴⁵ See *supra*, this ch., sec. 6 "Benefit Splits: Retirement Versus Termination Approach".

¹⁴⁶ The Commission believes that if a fee is to be charged, it should be deferred until the pension commences, or it should be deducted from the amount transferred.

Actuaries¹⁴⁷ and used under the *Pension Benefits Act* to value pensions for transfer purposes. We expect, therefore, that the proposed scheme is one that the pension industry should be able to accommodate with relative ease.

The Commission is aware that, from the perspective of the plan administrator, a benefit split is more complex than other options. With this in mind, the Commission has endeavoured to design a benefit split device that will impose minimum administrative burdens on plans administrators. As will be seen, for example, the rights of non-member spouses on a deferred benefit split are restricted.¹⁴⁸ In addition, we propose that a deferred benefit split be available to satisfy an equalization payment only in limited circumstances.

The Commission notes that many federal and provincial pension division-at-source schemes (though not the British Columbia legislation¹⁴⁹) refrain from requiring an administration fee. For example, there is no cost to the member or non-member spouse for a pension division at source under the Quebec

¹⁴⁷ See CIA Transfer Value Recommendations, *supra*, note 25.

¹⁴⁸ See *infra*, ch. 7, s. 4(b) "Deferred Benefit Splits". More extensive rights are conferred on non-member spouses in the provisions found in the *Family Relations Act* (B.C.), *supra*, note 39, s. 5.2(1), as en. by S.B.C. 1994, c. 6, s. 8:

55.3.—(2) A limited member has the following rights:

- (a) to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be, determined under this Part;
- (b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member;
- (c) except as modified by this Part, all of the rights of a member under the *Pension Benefits Standards Act*; and
- (d) such additional rights as are set out in this Part.

See, also, B.C. Report No. 123, *supra*, note 83, at 80.

¹⁴⁹ The *Family Relations Act* (B.C.), *supra*, note 39, s. 55.97(i), as en. by S.B.C. 1994, c. 6, s. 8, provides for regulations to prescribe fees for administering pension division at source.

The Law Reform Commission of British Columbia recommended an administrative fee based on the type of plan being divided: B.C. Report No. 123, *supra*, note 83, Regulation 10 of the proposed legislation, at 104. The recommended fees were as follows:

- (a) for a defined benefit plan: \$400.
- (b) for a defined contribution plan: \$100.
- (c) for a hybrid plan: \$500.

The British Columbia recommendations also included a proposal to ensure the sharing of the administrative costs between the parties: see B.C. Report No. 123, *ibid.*, s. 55.11 of the proposed legislation, at 91.

legislation.¹⁵⁰ The Saskatchewan *Pension Benefits Act, 1992*¹⁵¹ provides for pension division in the form of a transfer or the provision of a benefit split, but does not require a fee. Similarly, legislation in Nova Scotia and Prince Edward Island provides for a benefit split, but does not charge a fee.¹⁵² No fee is charged for a division under the federal *Pension Benefits Standards Act, 1985*.¹⁵³ Moreover, no fee is currently charged by Ontario plans, which must administer "if and when" arrangements under section 51 of the *Pension Benefits Act*.¹⁵⁴

The Commission recommends that the proposed pension division-at-source legislation should proscribe the charging of a fee by the plan administrator to the member spouse and/or the non-member spouse for effecting a pension division at source.

13. RETROACTIVITY

The Commission considers, in chapter 3 of this report, the effectiveness of the provisions for plan-administered "if and when" arrangements under section 51 of the *Pension Benefits Act*.¹⁵⁵ After a review of the existing legislation and an examination of its application in Ontario, the Commission has concluded that the legislation should be amended. In making this recommendation, the Commission considered the status of existing "if and when" arrangements. In discussing "if and when" arrangements, the Commission distinguishes between arrangements that have been implemented (that is, where the member has retired and payments have commenced to the non-member spouse) and arrangements that have not yet come into effect. There are two possible methods of enforcing "if and when" arrangements that are not implemented at the time the new legislation comes into effect: enforcement under the terms of the current legislation (which would continue in effect for this purpose); or enforcement under the Commission's proposed scheme for pension division at source. The Commission has concluded that it would be most efficient from the point of view of the parties and the plan administrators to bring "if and

¹⁵⁰ Janet G. Downing, *Pensions as Family Property* (September 18, 1992) (paper prepared for the Canadian Bar Association — Ontario, Continuing Legal Education, workshop on pensions), at 28.

¹⁵¹ *Supra*, note 35.

¹⁵² See *Pension Benefits Act* (N.S.), *supra*, note 27, and *Pension Benefits Act* (P.E.I.), *supra*, note 65.

¹⁵³ *Supra*, note 69.

¹⁵⁴ *Supra*, note 1.

¹⁵⁵ *Ibid.*

when" arrangements that have not been implemented into our proposed pension division-at-source scheme.¹⁵⁶

Including plan-administered "if and when" arrangements that have not been implemented in the Commission's proposed scheme will maximize the need for pension plans to enforce two separate pension division-at-source regimes. It will also provide additional security for the non-member spouse. For example, the proposed scheme will protect the interest of the non-member spouse in the event of the member's pre-retirement or post-retirement death, termination of employment, and wind-up of the plan. The proposed scheme will also entitle the non-member spouse to receive information from the plan.

The inclusion of existing "if and when" arrangements that have not been implemented under the current legislation also will have the effect of validating many arrangements that may be unenforceable under the current legislation. For example, instead of being subject to the fifty-percent rule now found in section 51(2) of the *Pension Benefits Act*, existing arrangements will be subject to a revised fifty-percent rule.¹⁵⁷ The proposed fifty-percent rule applies to fifty percent of the total value of the benefit at the date of retirement, whereas the current fifty-percent rule applies only to those benefits accrued during the period of marriage. Accordingly, arrangements invalid under the current legislation may be saved under the Commission's proposed scheme.

It has been brought to the Commission's attention that lawyers in Ontario are drafting domestic contracts that anticipate a change in the legislation to provide immediate transfers as a means of satisfying an equalization payment. Courts have also begun to make such orders.¹⁵⁸ The Commission believes that

¹⁵⁶ The Commission also considered whether our proposals should apply retroactively to spousal "if and when" arrangements. Under a spousal "if and when" arrangement, the member spouse holds the non-member spouse's share of the pension asset in trust and is required to pay a portion of the pension payment to the non-member spouse at the time the pension commences. The Commission declined to make recommendations regarding retroactivity and spousal "if and when" arrangements. The Commission recognized that spousal "if and when" arrangements are most commonly used as a last resort by the parties and thus it would be difficult, if not impossible in many cases, to bring those arrangements under the Commission's proposals. Spousal "if and when" arrangements are discussed in more detail *supra*, ch. 3.

¹⁵⁷ The Ontario Ministry of Financial Institutions recommended that its suggestions regarding the fifty-percent rule be applied retroactively "to alleviate concerns that recent settlements may contravene the 50% share rule": *supra*, note 72, at 90.

¹⁵⁸ For example, in *Smiley v. Ontario Pension Board*, unreported (June 9, 1994, Ont. Gen. Div.), at 6, Speyer J. quoted the following provision in the divorce judgment:

(d) In the event that the Province of Ontario does enact legislation allowing for the automatic splitting of employment pension benefits then the Husband and the pension

such domestic contracts and orders should be given full force and effect under its proposed scheme.¹⁵⁹ This would include those orders and domestic contracts made prior to 1988, which anticipated the introduction of the current provisions of the *Pension Benefits Act* respecting plan-administered “if and when” arrangements.

The Commission does not believe that our retroactivity proposals should apply to existing orders and domestic contracts where an actual division of a matured pension has taken place before the legislation comes into effect. Where the pension is in pay and a matured pension has been divided, the plan administrator should not be required to apply another form of pension division.¹⁶⁰ In those instances, the division of the pension in accordance with the existing legislation should continue. To do otherwise would present an unjustifiable administrative burden.

Existing orders and domestic contracts will not comply with the requirements for pension division at source set out in this report. For example, the parties will not have complied with the prescribed process for notifying the

administrator shall do so such that the sums due to the Petitioner Wife pursuant to the terms of this Judgment are separately administered and separately payable to her.

¹⁵⁹ The Commission's recommendations concerning retroactivity are similar to those in the *Family Relations Act* (B.C.), *supra*, note 39. The British Columbia legislation applies automatically where marriage breakdown has occurred, but where the pension asset is not settled. The Act provides that the legislation will apply in limited circumstances to pension arrangements settled before the legislation comes into force. Where the pension is not yet in pay, the parties can agree to opt into the new legislation, or one party can make a court application that would direct the new legislation to apply to the existing order or arrangement. See *Family Relations Act* (B.C.), *ibid.*, s. 55.92(2), as en. by S.B.C. 1994, c. 6, s. 8:

55.92—(2) Despite section 55.2(2), if

- (a) a spouse becomes entitled under Part 3 to an interest in family assets before the coming into force of this Part,
- (b) the pension is to be divided by having the member pay the spouse a proportionate share of benefits payable under the pension, and
- (c) the member has not yet retired or the spouse is not yet receiving benefits,

the spouse and member may agree to divide the pension in accordance with this Part and, in that case, a notice in the prescribed form issued under section 55.3(1) is as valid as if entitlement to an interest in family assets arose after the coming into force of this Part.

See the discussion in B.C. Report No. 123, *supra*, note 83, at 90.

¹⁶⁰ This is also the approach of the British Columbia legislation: see the *Family Relations Act* (B.C.), *supra*, note 39, s. 55.92, as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 83, at 90.

plan administrator, nor will they have filed the necessary forms. In many cases, it may be difficult to fit existing arrangements into the Commission's options for pension division at source. The Commission proposes to deal with problems associated with retroactivity by providing the parties with the option of applying to a court for an order resolving any potential problems. For example, where the parties are not sure how to fill out the "Notice of Division" form, they will be able to apply to a court for assistance. The purpose of the application will not be to alter the financial settlement previously agreed to.¹⁶¹ The court will have the responsibility of settling the terms of a Notice of Division with a view to giving effect to the original intentions of the parties.

The Commission recommends that the proposed pension division-at-source legislation should provide that all existing orders and domestic contracts under section 51 of the *Pension Benefits Act* providing for plan-administered "if and when" arrangements that have not been implemented under the current legislation should be given full force and effect under the proposed legislation.

The Commission recommends that proposed pension division-at-source legislation should provide that all existing orders and domestic contracts that are made in contemplation of future reform of pension legislation should be given full force and effect under the proposed legislation.

The Commission recommends that the proposed pension division-at-source legislation should provide that,

- (a) where spouses are subject to existing orders or domestic contracts providing for "if and when" arrangements under section 51 of the *Pension Benefits Act* that have not been implemented under the current legislation, or that are made in contemplation of future reform of pension legislation, and
- (b) where spouses are required to or wish to bring these orders or domestic contracts under the proposed pension division-at-source legislation,

either or both of the spouses may apply to a court to settle any terms concerning the manner in which existing orders and domestic contracts will be implemented under the proposed legislation.

¹⁶¹ The terms and effect of a Notice of Division are discussed in more detail *infra*, ch.7. Some current agreements may contemplate a transfer, pending changes in the legislation, even though that option is not currently available. However, where an existing order or agreement does not contemplate the transfer option set out in these proposals, but only contemplates a benefit split (for example, an "if and when" arrangement whether it be spousal or plan-administered), then the transfer option should not be made retroactively available.

14. APPROPRIATENESS OF PENSION DIVISION AT SOURCE AS SETTLEMENT METHOD UNDER *FAMILY LAW ACT*

(a) PROCESS FOR DETERMINING APPROPRIATE SETTLEMENT METHOD

Prior to a pension division at source being effected, a determination must be made whether it is an appropriate option to settle an equalization entitlement. The Commission believes that the mechanisms now in place for settling an equalization entitlement under the *Family Law Act* should apply to our pension division-at-source scheme. As a rule, the method of satisfying an equalization payment is left to negotiation between the parties. Where the parties cannot agree, they are entitled to seek court assistance under section 7(1) of the *Family Law Act*.¹⁶² Section 7 allows a spouse to make an application to the court to determine a matter respecting an equalization of family property. Where a section 7 application is made, the court can make an order in accordance with section 9.

Section 9(1) of the *Family Law Act* sets out a number of options for meeting an equalization payment as determined under section 5 of the Act. For example, a court may order that the payment be made in cash.¹⁶³ If the court believes that a cash payment would result in hardship, it can make a number of alternative orders, including an order that the equalization payment be made in instalments during a period not exceeding ten years, or that the payment be delayed for a period not exceeding ten years.¹⁶⁴ The court can also order that security be given for the performance of any obligation contained in the order.¹⁶⁵ The court can also make an order dealing directly with the spouse's property to satisfy an equalization payment, including an order that the property be transferred, partitioned, or sold.¹⁶⁶ The court can order that property be transferred to, put in trust for, or vested in a spouse, whether absolutely for life or for a term of years.¹⁶⁷ The courts have made orders respecting "if and when" arrangements under this latter provision.

While the Commission agrees with the general approach for settling an equalization matter under the *Family Law Act*, we wish to clarify when pension division at source will be an appropriate settlement option. A determination of

¹⁶² *Supra*, note 3.

¹⁶³ *Ibid.*, s. 9(1)(a).

¹⁶⁴ *Ibid.*, s. 9(1)(c).

¹⁶⁵ *Ibid.*, s. 9(1)(b).

¹⁶⁶ *Ibid.*, s. 9(1)(d).

¹⁶⁷ *Ibid.*, s. 9(1)(d)(i).

the availability of a transfer or a benefit split (immediate or deferred) as a means of pension division at source will depend in the first instance on whether a pension plan is matured or unmatured, and whether it is a defined benefit plan or a defined contribution plan. In the case of a matured plan, whether a defined benefit plan or a defined contribution plan, the only option for pension division at source is an immediate benefit split. In the case of an unmatured defined contribution plan, the transfer option will be the only method of pension division at source available. If the plan being divided is a unmatured defined benefit plan, two options will be available, a transfer and a deferred benefit split. If the plan is an unvested defined benefit plan, only the transfer option will be available. The availability of these pension division-at-source options to settle an equalization entitlement should, in the Commission's view, be determined by set criteria and not left to litigation or the current law. The Commission suggests that transfers and benefit splits be treated differently for the purposes of section 9.

(b) TRANSFER

A transfer of a portion of the value of a pension plan at the time of marriage breakdown should be treated as a property order under section 9 of the *Family Law Act*.¹⁶⁸ Section 9(1)(d)(i) permits the court to order a transfer of property in partial or total satisfaction of the equalization claim. The courts have sometimes been reluctant to use property orders to satisfy equalization payments.¹⁶⁹ The Commission, however, finds attractive the reasoning in the Ontario decision of *Oliva v. Oliva*,¹⁷⁰ where the Court transferred the husband's interest in the matrimonial home to the wife on the general principle that immediate transfers of value are to be preferred, and "should be made immediately unless there is clear evidence that it would cause hardship to do so".¹⁷¹ Where an immediate cash payment cannot be made, a transfer of pension property therefore appears appropriate.

A transfer of a share of the pension to satisfy an equalization obligation is similar to the transfer of other assets and thus should be ordered as readily, even though it will result in the involvement of a third party, the plan administrator. Third parties are involved in the division of many kinds of assets—for example, RRSPs, shares, partnership interests, businesses, and commercial real estate. A

¹⁶⁸ *Ibid.*

¹⁶⁹ Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991), at 458.

¹⁷⁰ (1986), 2 R.F.L. (3d) 188 (Ont. H.C.J.); varied on another point (1988), 12 R.F.L. (3d) 334 (Ont. C.A.).

¹⁷¹ *Ibid.*, at 211 (H.C.J.).

transfer effects an immediate settlement of the affairs of the parties, and provides the non-member spouse with a retirement income vehicle. It is, therefore, in the Commission's view, a very desirable settlement option.

(c) BENEFIT SPLIT

A benefit split of a pension benefit on retirement should be dealt with in a manner similar to the way in which "if and when" arrangements are dealt with under the *Family Law Act*.¹⁷² There is considerable case law on the issue of when it will be appropriate to implement an "if and when" arrangement to satisfy an equalization payment.¹⁷³ In the past, when the courts have been faced with the choice of a settlement of a pension asset by cash, by transfer of other assets, or by creation of an "if and when" arrangement, they have opted for cash or a transfer of other assets except where those methods have presented serious hardship for the spouse owing the equalization payment.¹⁷⁴

Recently, the Ontario Court of Appeal in *Best v. Best*¹⁷⁵ considered the appropriateness of a plan-administered "if and when" arrangement under section 51 of the *Pension Benefits Act*¹⁷⁶ as a means of satisfying an equalization payment. A preference was expressed for a cash lump-sum settlement because it enabled both spouses to pursue their independent lives and make plans for the future. The Court also held that the hardship of the payment of a cash lump sum to the spouse should be balanced against the hardship to the other spouse of not receiving immediate payment.¹⁷⁷ Other critical factors in the decision to order an

¹⁷² *Supra*, note 3, s. 9(1)(d)(i).

¹⁷³ See *Aylsworth v. Aylsworth* (1987), 9 R.F.L. (3d) 105 (Ont. H.C.J.); *Ward v. Ward* (1988), 13 R.F.L. (3d) 259 (Ont. H.C.J.), varied (1990), 26 R.F.L. (3d) 149 (Ont. C.A.); *Davies v. Davies* (1988), 13 R.F.L. (3d) 103 (Ont. H.C.J.); *Messier v. Messier* (1986), 5 R.F.L. (3d) 251, 14 C.C.E.L. 317 (Ont. Dist. Ct.); *Ryan v. Ryan*, unreported (July 23, 1986, Ont. Dist. Ct.); *Humphreys v. Humphreys* (1987), 7 R.F.L. (3d) 113 (Ont. H.C.J.); *Forster v. Forster* (1987), 11 R.F.L. (3d) 121 (Ont. H.C.J.); *Porter v. Porter* (1986), 1 R.F.L. (3d) 12 (Ont. Dist. Ct.); *Thompson v. Thompson* (1987), 62 O.R. (2d) 425 (S.C.); *Wettlaufer v. Wettlaufer* (1988), 12 R.F.L. (3d) 379 (Ont. Dist. Ct.); *Storms v. Storms* (1988), 14 R.F.L. (3d) 317 (Ont. Dist. Ct.); *Hilderley v. Hilderley* (1989), 21 R.F.L. (3d) 383 (Ont. H.C.J.); *Marsham v. Marsham* (1987), 59 O.R. (2d) 609, 7 R.F.L. (3d) 1 (H.C.J.) (subsequent references are to 59 O.R. (2d)); *Kukolj v. Kukolj* (1986), 3 R.F.L. (3d) 359 (Ont. U.F.C.); and *Woeller v. Woeller* (1988), 15 R.F.L. (3d) 120 (Ont. Dist. Ct.).

¹⁷⁴ *Hovius and Youdan, supra*, note 169, at 459, n. 38.

¹⁷⁵ (1992), 9 O.R. (3d) 277, 41 R.F.L. (3d) 383 (C.A.) (subsequent references are to 41 R.F.L. (3d)).

¹⁷⁶ *Supra*, note 1.

¹⁷⁷ *Best v. Best, supra*, note 175, at 388.

"if and when" arrangement included the age of the parties and the date on which the pension payments were to commence. The Court concluded that "if and when" arrangements are not the most appropriate option when the parties are not close to retirement.¹⁷⁸ Weiler J.A., who delivered the judgment of the Court, held that where a spouse has a pension that is not due to mature within ten years, an "if and when" arrangement is inappropriate.¹⁷⁹

The Commission is reluctant to suggest strict imposition of the criteria articulated in *Best v. Best* as the basis for ordering a benefit split, as those criteria were developed in the context of existing "if and when" arrangements and, therefore, may not be directly applicable.¹⁸⁰ However, the Commission agrees with the basic principle set out in that case, that is, that cash, transfer of assets (including transfer of a share of a pension asset), or delayed and periodic payments are preferable to a benefit split where these other options are available. It is only where these alternatives are not available that a benefit split should be ordered. In particular, a deferred benefit split requires an ongoing relationship between spouses, with the non-member spouse relying on both the continued membership of the member and the continued existence of the plan. Because the deferred benefit split is the more complicated and risky option from the point of view of both the spouses and the pension plan, it should be used only as a last resort.¹⁸¹ Both immediate and deferred benefit splits are complex for the plan to administer.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Some of the reluctance of the courts to order plan-administered "if and when" arrangements may be due in part to the inadequacies of the current legislation respecting plan-administered "if and when" arrangements, in particular its inability to protect the interests of the non-member spouse in the event of death or termination of employment.

¹⁸¹ This order of preference reflects the recommendations of the Alberta Institute of Law Research and Reform, in its Report No. 48, *supra*, note 106, Recommendation No. 20, at 8, where it made the following proposals:

- (a) that the proposed legislation establish an order of preference among the proposed methods of division,
- (b) that the order of preference be as follows: (1) valuation and accounting, (2) valuation and division, (3) provision of a separate pension for the non-employee spouse, (4) division of proceeds by the pension plan administrator, and (5) division of proceeds by the employee spouse, and
- (c) that a method of division later in the order of preference be adopted only if all methods earlier in the preference are inapplicable or beyond the Court's jurisdiction or would cause a result which would not be just and equitable; provided that the order of preference need not be followed if following it would cause hardship.

(d) RECOMMENDATIONS FOR REFORM

The Commission recommends that the proposed pension division-at-source legislation should provide that, where one of the assets subject to equalization is a pension, and where an application is made under section 7 of the *Family Law Act* to determine the appropriate settlement option under section 9 of the *Family Law Act*, the court should adopt the order of priority of settlement methods as set out below:

- (a) Where the pension is unvested (defined benefit plans and defined contribution plans), the following order should be adopted:
 - (i) cash payment;
 - (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation; and
 - (iii) any other order available under section 9 of the *Family Law Act*.
- (b) Where the pension is an unmatured, vested defined contribution plan, the following order should be adopted:
 - (i) cash payment;
 - (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation; and
 - (iii) any other order available under section 9 of the *Family Law Act*.
- (c) Where the pension plan is an unmatured, vested defined benefit plan, the following order should be adopted:
 - (i) cash payment;
 - (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation;

- (iii) any other order available under section 9 of the *Family Law Act*; and
 - (iv) a deferred benefit split in accordance with the proposed pension division-at-source legislation.
- (d) Where the pension plan is matured and vested (defined contribution plans and defined benefit plans), the following order should be adopted:
 - (i) cash payment;
 - (ii) any other order available under section 9 of the *Family Law Act*; and
 - (iii) an immediate benefit split in accordance with the proposed pension division-at-source legislation.

CHAPTER 7

SETTLING PENSION ASSETS ON MARRIAGE BREAKDOWN: TRANSFERS AND BENEFIT SPLITS

1. INTRODUCTION

Under the *Family Law Act*,¹ parties to a marriage breakdown are required to determine the value of their net family property. Section 4 of the Act sets out what is to be included in each spouse's net family property, and section 5 requires that the property be equalized by way of a payment from the spouse with the greater net family property to the spouse with the lesser net family property. Section 7 allows a spouse to apply to court to determine any matter respecting a spouse's entitlement under section 5, and section 9 provides a number of options that a court can order to satisfy an equalization claim. These include a cash lump-sum payment, a transfer of assets, instalment payments, the provision of security for deferred payment, and trust arrangements.

"If and when" arrangements, whether plan-administered² or spousal, have also been available to satisfy equalization entitlements where one of the family assets is a pension. The Commission has determined that the current regime of plan-administered "if and when" arrangements is in need of reform. In this chapter we make proposals that would replace the current regime with a new pension division-at-source scheme, which would provide additional options to those available under section 9 of the *Family Law Act*. The proposed reforms will permit spouses to divide pension assets at source to satisfy an equalization entitlement by either transferring a lump sum out of the pension plan at the time of marriage breakdown or creating a benefit split payable on the member spouse's retirement.³

¹ R.S.O. 1990, c. F.3. For a more detailed discussion of these provisions of the *Family Law Act*, see *supra*, ch. 3.

² See *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 51.

³ The Commission uses a simplified set of pension terms to describe its pension division-at-source scheme: see *supra*, ch. 1, sec. 2 "Terminology". See, also, Appendix A, *infra*, for a glossary of pension terms developed by the Pension Commission of Ontario.

Under the Commission's proposals, a specified dollar amount can be transferred out of a pension into another pension vehicle to satisfy an equalization entitlement. A pension vehicle is a locked-in scheme that provides for retirement income. This includes a locked-in prescribed retirement savings arrangement under the *Pension Benefits Act*,⁴ a locked-in deferred annuity, or another registered pension plan. Where spouses opt for the transfer of an amount out of the member's plan to another pension vehicle, the non-member spouse acquires no special rights in the member's pension.

The Commission also proposes that a benefit split be available to satisfy an equalization entitlement where the non-member spouse acquires the right to a periodic payment in the future, as well as certain rights with respect to his or her share of the pension asset. The amount of the periodic payment that the non-member spouse is entitled to receive is based on a fractional interest of the total value of the member's pension. This fractional interest is determined on the date of retirement in the case of an unmatured defined benefit plan, or the projected settlement date in the case of a matured pension plan. There are two kinds of benefit splits: immediate and deferred. An immediate benefit split is an option only where the pension is in pay, that is, where the pension is matured. A deferred benefit split is an option where the pension is a defined benefit plan not yet in pay, that is, where it is unmatured.

The proposed pension division-at-source scheme contemplates different methods of pension division for different types of pension plans.⁵ The scheme provides for the division of defined benefit plans, defined contribution plans, and hybrid plans. The availability of the proposed pension division-at-source options also depends on whether the pension is matured or unmatured, that is, whether pension payments have commenced at the date of settlement. For example, in the

⁴ *Supra*, note 2, s. 42(1)(b), and regulations under the *Pension Benefits Act*, R.R.O. 1990, Reg. 909, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

⁵ This approach taken by the Ontario Law Reform Commission to pension division at source mirrors the approach of the Law Reform Commission of British Columbia in its *Report on the Division of Pensions on Marriage Breakdown* (Report No. 123) (Vancouver: Ministry of Attorney General, January 1992) (hereinafter referred to as "B.C. Report No. 123"). The proposed legislation set out in B.C. Report No. 123 is reproduced *infra*, Appendix D.

In developing its proposals, the Ontario Law Reform Commission derived assistance from B.C. Report No. 123, as well as the Law Reform Commission of British Columbia's earlier *Working Paper on Division of Pensions on Marriage Breakdown* (Working Paper No. 65) (Vancouver: Ministry of Attorney General, December 1990).

The recommendations of the Law Reform Commission of British Columbia have been incorporated into legislation: see the *Family Relations Amendment Act*, 1994, S.B.C. 1994, c. 6, reproduced *infra*, Appendix E, which amends the *Family Relations Act*, R.S.B.C. 1979, c. 121. These amendments are to come into force by regulation of the Lieutenant Governor-in-Council.

case of a defined contribution plan that is unmatured, the non-member spouse is restricted to one option, namely a transfer of his or her share of the accumulated value to another locked-in pension vehicle. The only option available to the non-member spouse in the case of a defined contribution plan that has matured is an immediate benefit split. In the case of an unmatured defined benefit plan, the non-member spouse has two options, namely a transfer of the commuted value to another pension vehicle or a deferred benefit split. In the case of a matured defined benefit plan, the non-member spouse has only one option, namely an immediate benefit split.

The Commission recommends that the proposed pension division-at-source legislation should provide additional methods of settling an equalization entitlement arising under section 5 of the *Family Law Act*.

The Commission recommends that section 9(1) of the *Family Law Act*, which prescribes the methods by which an equalization entitlement may be settled, should be amended to permit the settlement of an equalization entitlement in accordance with the proposed pension division-at-source legislation.

The Commission recommends that the proposed pension division-at-source legislation should provide that, in addition to the methods set out in section 9(1) of the *Family Law Act* for settling an equalization entitlement, the following options should be available where one of the family assets is a pension:

- (a) a transfer of a portion of the value of the pension out of the pension plan to the benefit of the non-member spouse at the time of marriage breakdown; or
- (b) a benefit split where the pension plan administrator is required to create two separate pensions providing periodic payments to the member and non-member spouses.

The Commission recommends that the proposed pension division-at-source legislation should provide that the non-member spouse should have the option to transfer a share of the value of a pension plan to another locked-in pension vehicle to satisfy an equalization entitlement under the *Family Law Act*, in the following circumstances:

- (a) where the pension is an unmatured defined benefit plan, or
- (b) where the pension plan is unmatured defined contribution plan.

The Commission further recommends that the proposed pension division-at-source legislation should provide that the benefit split be available in two forms:

- (a) an immediate benefit split for the division of a matured defined benefit plan or a matured defined contribution plan, where a separate pension for the benefit of the non-member spouse is created on a projected settlement date; and
- (b) a deferred benefit split for the division of an unmatured defined benefit plan, where the creation of a separate pension for the benefit of the non-member spouse is deferred until the date of retirement of the member.

2. PROCEDURES FOR PENSION DIVISION AT SOURCE

Under the current provisions of the *Pension Benefits Act* for plan-administered “if and when” arrangements, there are two prescribed procedures to effect a pension division at source.⁶ This has, in many cases, created hardship for spouses faced with plan administrators who repeatedly reject orders and domestic contracts, and for plan administrators faced with orders and domestic contracts that are substantially unenforceable. The Commission wishes to develop procedures for effecting pension division at source that are simple and straightforward from the point of view of the plan administrator, and that can be readily understood and implemented by the spouses.

(a) FILING REQUIREMENTS

(i) Notice of Intention to Divide Pension at Source

Under the Commission’s proposed scheme, a spouse, in the appropriate case, will be entitled to file a “Notice of Intention” with the plan administrator indicating an intention to divide the pension asset at source.⁷ The form of the Notice of Intention will be prescribed by regulation. The Notice of Intention should include the following information: the names and addresses of the spouses (or the addresses of agents for service), their birth dates, the projected settlement date in the case of the division of a matured pension, and the date of separation. The Notice of Intention will put the plan administrator on notice that the pension will be divided at source at some point in the future. It will not affect pension division at source, and therefore will only require the signature of the applying spouse.

⁶ *Pension Benefits Act*, *supra*, note 2, s. 51.

⁷ See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.3(1), as en. by S.B.C. 1994, c. 6, s. 8. This procedure is based on B.C. Report No. 123, *supra*, note 5, Regulation 7(1) of the proposed legislation, at 100.

On receipt of a Notice of Intention, in the case of a vested pension, the plan administrator will be required, within a prescribed time period, to provide the spouses with a copy of the last annual statement sent to the member, and a calculation of either the commuted value (in the case of a defined benefit plan) or the accumulated value (in the case of a defined contribution plan) of the pension as of the date of filing the Notice of Intention. Where the pension has not yet vested, the plan administrator will be required to provide the spouses with a value representing the cash amount that would be available to the member on termination of employment as of the date of filing.

In the case of the division of a matured pension, the plan administrator will be required to provide the spouses with the recalculated value of the pension as of a projected settlement date. This projected settlement date must be set out in the Notice of Intention and should not be the date of filing the Notice of Intention. Where the pension is in pay and the pension payments are ongoing, a recalculation done at the date of filing the Notice of Intention would result in a shortfall to the member spouse or require additional funding by the plan, because it would not reflect the ongoing payments to the member. In that instance, the value placed on the pension available for distribution would be higher than the actual value of the pension that would remain when the pension was actually divided.

The plan administrator will also be required to provide a statement to the spouses indicating that no more than fifty percent of the pension benefit is available for distribution. The statement must also set out the maximum amount available for distribution on a transfer, or the percentage of the pension available to be assigned on a benefit split.

The plan administrator will be required to send a copy of the Notice of Intention to the non-applying spouse. The Notice of Intention should be filed within the time limits prescribed in the *Family Law Act*⁸ where no other steps have been taken to share family assets.

⁸ *Supra*, note 1, s. 7(3).

(ii) Notice of Pension Division at Source

Once the spouses negotiate a domestic contract respecting pension division at source in accordance with the *Family Law Act*,⁹ or once a court orders a division under the Act,¹⁰ the spouses will be required to file a "Notice of Division" with the plan administrator. This document must be signed by both spouses, where the division is effected by way of a domestic contract, or by a judge, in the case of a court order.¹¹ The effect of filing a Notice of Division will be to place a legal duty on the plan administrator to effect the division in accordance with the notice. Where a transfer option is indicated in the Notice of Division, the plan administrator will be required to effect the transfer within a time period prescribed in regulations. The Notice of Division will include basic information required by the plan to effect the division, such as the type of division requested (a transfer or an immediate or deferred benefit split); the names and addresses of the member and the non-member spouse (or the addresses of agents for accepting documents); the birth dates of the spouses; the amount of the transfer payment; in the case of a benefit split, the fractional interest to be acquired; and, where there is a domestic contract between the spouses pursuant to the *Family Law Act*, an affidavit that provides evidence of the creation and dissolution of the relationship.¹² The form to be used for a Notice of Division should be prescribed by regulation.

The Commission suggests further that, where a Notice of Division is filed with the plan administrator and the option selected is a benefit split, the plan administrator should provide the non-member spouse with the same information package that it would provide to a new member.¹³ Similarly, where the option selected is a transfer, the plan administrator should provide the non-member spouse with the same information that it would provide to a member on termination of employment.¹⁴

⁹ *Ibid.*, s. 51.

¹⁰ *Ibid.*, ss. 7, 9.

¹¹ *Ibid.*, ss. 51, 7. A Notice of Division should be attached to the court order, be signed by the issuing judge, and form part of the order.

¹² *Supra*, note 1, s. 51.

¹³ See *Pension Benefits Act*, *supra*, note 2, s. 25.

¹⁴ See *ibid.*, s. 28.

(iii) Request for Clarification

Where, in the opinion of the plan administrator, the Notice of Division form is improperly filled out or the required division violates the fifty-percent rule, or the plan administrator is unable to effect the division indicated in the Notice of Division because the direction is contrary to the provisions of the *Pension Benefits Act* or the terms of the pension plan, the plan administrator will be obliged to return the Notice of Division to the spouses with a "Request for Clarification", setting out the reasons why the division cannot be implemented. This communication should be delivered within a prescribed time period.¹⁵

Where the plan administrator believes that a Notice of Division is unenforceable and delivers a Request for Clarification to the spouses, and the spouses are unable to agree to a variation that would make the Notice of Division enforceable, they should be entitled to apply to the court for assistance in settling the terms of the Notice of Division. The court will not be authorized, on such an application, to renegotiate or redraft the order or domestic contract, but will only be authorized to determine the information required to complete the Notice of Division.¹⁶

An application to the court should be available only to resolve a deficiency in a Notice of Division as set out in a Request for Clarification. It should not be available where the spouses cannot agree on pension division at source to settle an equalization payment under the *Family Law Act*.¹⁷ In the latter instance, the spouses will be required to proceed under section 7 of the *Family Law Act* for an order respecting the appropriate settlement mechanism. The court may then consider whether, under section 9 of the *Family Law Act*, pension division at source is appropriate in the circumstances.

The plan administrator should not be required to proceed to court to obtain clarification or correction of a deficiency in a Notice of Division. Where the

¹⁵ Similar recommendations are found in B.C. Report No. 123, *supra*, note 5, Regulation 8(3) of the proposed legislation, at 102:

8.—(3) If a Notice is invalid, incomplete or fails to provide sufficient information to carry out the division of the pension, the administrator must refuse to comply with it by advising both the spouse and the member of the objection by ordinary mail at the addresses given on the Notice.

¹⁶ It will be necessary for the court to actually fill out the Notice of Division and not merely order that the spouses change the Notice of Division or that the plan administrator carry out the division. In many instances, court orders are invalidly or incorrectly drafted, and the Commission does not wish to impose on plan administrators the added burden of interpreting them.

¹⁷ *Supra*, note 1.

spouses refuse to comply with a request by the plan administrator to correct a deficiency in a Notice of Division, or do not respond to a Request for Clarification within the prescribed time period, the plan administrator will have discharged its obligation to comply with the Notice of Division.¹⁸

The plan administrator should be in a position to rely on the Notice of Division in effecting the division at source, and should not be forced to determine the details of the pension division arrangements from court orders or domestic contracts. Where the plan administrator relies on a Notice of Division that reasonably appears to be enforceable on its face and implements the division at source, the plan administrator will not be liable for any loss or damage to the spouses that might arise because the terms of the notice are erroneous or invalid.¹⁹

(iv) Notice of Revocation

In some circumstances, spouses who have opted for a deferred benefit split may later wish to alter those arrangements. Where both spouses agree, the member spouse should be able to, in effect, buy back the non-member's share. Under the Commission's proposals, this will be accomplished by filing a Notice of Revocation with the plan administrator in a form prescribed by regulation and requiring the signature of both spouses.

A Notice of Revocation will be used where the spouses, at some date after a Notice of Division is filed but before the deferred benefit split commences, agree to settle the equalization payment by some method other than a deferred benefit split. For example, before the actual retirement date the member spouse may be in a position to pay out the equalization payment in cash or through the transfer of other assets. Where that is the case, the spouses should be free to enter into a contractual arrangement to do so.²⁰ In those circumstances, the filing

¹⁸ This is unlike the proposals of the Law Reform Commission of British Columbia, in Report No. 123, *supra*, note 5, Regulation 8(2) of the proposed legislation, at 102, which require the plan administrator to proceed to court where notice has been given to the parties that the arrangement is unenforceable and where the parties refuse to correct "Form B":

8.—(2) The administrator of a plan affected by the order may apply to set aside or vary the order where either it directs a division of a pension that is not authorized under this Part, or does not provide sufficient information to carry out the court's direction.

¹⁹ This is similar to a provision suggested by the Law Reform Commission of British Columbia in its Report No 123, *ibid.*, Regulation 8(5) of the proposed legislation, at 102:

8.—(5) Neither the administrator nor the plan is liable for loss or damage arising in reliance upon an invalid Notice that appeared to be valid.

²⁰ A similar recommendation was made by the Alberta Institute of Law Research and Reform (now Alberta Law Reform Institute), in *Matrimonial Property: Division of Pension Benefits*

of a Notice of Revocation will relieve the plan administrator of any duty to effect a deferred benefit split.

There should be no revocation permitted of an immediate benefit split because of the administrative complexity of such an undertaking where a pension is in pay. Where the mechanism employed for a division at source is a transfer, there should be no revocation once a lump sum has been paid out of the pension plan.

(b) ENFORCEMENT OF PENSION DIVISION AT SOURCE

The Commission is aware that there have been problems with the enforcement of existing "if and when" arrangements under section 51 of the *Pension Benefits Act*.²¹ Some problems have arisen because plan administrators have refused to enforce "if and when" orders and domestic contracts. In other cases, the orders and domestic contracts are, or are perceived to be, unenforceable by the plan administrator because they are improperly drafted.

It is essential that pension division at source be enforceable against the pension plan administrator. The Commission therefore suggests that, where there are enforcement problems, either or both of the spouses should be able to apply to court for an order directing the plan administrator to implement the pension division at source in accordance with the terms set out in the Notice of Division.²² Such problems might occur where a plan administrator refuses to

upon Marriage Breakdown, Report No. 48 (Edmonton: June 1986) Recommendation No. 17, at 38 (hereinafter referred to as "Alta. Report No. 48"), as follows:

- (a) that the Court have power, in a matrimonial property order or at any time before an employee transfers a pension benefit from one pension plan to another, to direct that valuation and division be substituted for the provision of a separate pension or for the division of proceeds.

²¹ *Supra*, note 2.

²² Recommendations by the Law Reform Commission of British Columbia provide a remedy where the plan administrator fails to effect the required pension division. See B.C. Report No. 123, *supra*, note 5, Regulation 8(1) of the proposed legislation, at 101:

8.—(1) Where ... a plan fails to act upon a Notice within 30 days of its delivery, the spouse may apply to the court for an order

- (a) designating the spouse to be a limited member of a plan,
- (b) directing a payment out of the commuted value of a spouse's share from a defined benefit plan,
- (c) directing the plan to create a separate pension in favour of the spouse,

implement a valid Notice of Division; where a plan administrator claims that a Notice of Division is invalid and delivers to the spouses a Request for Clarification that, in the spouses' estimation, is unnecessary or unwarranted; or where one or both of the spouses contest the manner in which the Notice of Division is implemented by the plan administrator. An application to enforce pension division should be made on notice to the plan administrator, as well as to the spouse not commencing the action.

Where an application has been made by a spouse to enforce a division in accordance with a Notice of Division, and a court order is made directing the division, the plan administrator must comply with the order or be in contempt of the order. If the plan administrator fails to comply with an order to enforce a Notice of Division and fails to effect a division in accordance with a Notice of Division, the plan will be liable to the parties for any loss or damage incurred as a result.²³

(c) RECOMMENDATIONS FOR REFORM

The Commission recommends that the proposed pension division-at-source legislation should prescribe the following procedure for effecting pension division at source:

- (a) A spouse who wishes to initiate pension division at source should file with the plan administrator a Notice of Intention, signed by the spouse, in a form prescribed by regulation, containing the following information:
 - (i) the names of both spouses;
 - (ii) the addresses of both spouses (or the addresses of agents);

- (d) directing a payment out of a spouse's share from a defined contribution plan that has not yet matured, or

- (e) otherwise directing the plan to comply with the Notice

as authorized under the Act.

²³ See a similar provision in the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.3(2)(b), as en. by S.B.C. 1994, c.6, s. 8:

55.3—(2)(b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member.

See, also, B.C. Report No. 123, *supra*, note 5, at 80.

- (iii) the birth dates of both spouses;
 - (iv) the date of separation; and
 - (v) the projected date of settlement, in the case of the division of a matured pension.
- (b) On receiving a Notice of Intention, the plan administrator should provide, within a prescribed time period, to the non-applying spouse, a copy of the Notice of Intention and, to both spouses, the following information:
- (i) the total commuted value of an unmatured defined benefit plan available for transfer as of the date of filing the Notice of Intention;
 - (ii) the total accumulated value of an unmatured defined contribution plan available for transfer as of the date of filing the Notice of Intention;
 - (iii) where the pension payments have already commenced, the value of the matured pension as of a projected settlement date set out in the Notice of Intention;
 - (iv) a copy of the last annual statement sent to the member spouse;
 - (v) where the pension has not vested, the value of the unvested pension available for transfer on termination of the member's employment as of the date of filing the Notice of Intention;
 - (vi) the maximum dollar value of the pension available for transfer purposes under the fifty-percent rule; and
 - (vii) the maximum fractional interest of the pension available to be assigned on a benefit split under the fifty-percent rule.
- (c) In order to place a legal duty on the plan administrator to proceed with a pension division at source, the spouses should be required to file a Notice of Division with the plan administrator.
- (d) The form of the Notice of Division should be prescribed by regulation and should contain the following information:
- (i) the type of pension division at source requested (a transfer, an immediate benefit split, or a deferred benefit split);

- (ii) the names and addresses of both spouses (or the addresses of agents);
 - (iii) the birth dates of both spouses;
 - (iv) the dollar figure to be transferred to the non-member spouse, or the fractional interest to be acquired by the non-member spouse in the case of a benefit split; and
 - (v) an affidavit that provides evidence of the creation and dissolution of the marriage.
- (e) The Notice of Division should be signed by both spouses, where an equalization entitlement is settled pursuant to a domestic contract under section 51 of the *Family Law Act*, or by a judge, where an equalization entitlement is settled by a court order under section 9 of the *Family Law Act*.
- (f) On receiving a Notice of Division, the plan administrator should provide to the non-member spouse, within a prescribed time period, the following information:
- (i) in the case of a benefit split, the information that would be provided to a new member; and
 - (ii) in the case of a transfer, the information that would be provided to a member on termination of employment.
- (g) On receiving the Notice of Division, the plan administrator should effect pension division at source in accordance with the Notice of Division within a time period prescribed by regulation.
- (h) Where the plan administrator is unable to effect pension division at source because
- (i) the Notice of Division is improperly filled out,
 - (ii) the requested division violates the fifty-percent rule, or
 - (iii) the requested division is contrary to the provisions of the *Pensions Benefits Act* or the terms of the pension plan,

the plan administrator should return the Notice of Division to the spouses within a prescribed time period with a Request for Clarification identifying the deficiencies.

- (i) Where a Request for Clarification has been received by the spouses and where the spouses cannot agree on the terms that would cure the defect in a Notice of Division, either spouse should have the right to apply to court to have the terms of the Notice of Division determined.
- (j) Where the plan administrator fails to implement the Notice of Division within the prescribed time period, either spouse, on notice to the plan administrator and to the other spouse, should have the right to apply to court for an order directing the plan administrator to comply with the Notice of Division.
- (k) Where a plan administrator refuses to comply with an order under (j) and either of the spouses suffers financial loss as a result, that spouse should have the right to apply to court for the recovery of damages from the plan administrator respecting that loss.
- (l) The plan administrator should be discharged from its obligations to the spouses under the pension division-at-source legislation once the plan administrator has implemented a division in accordance with a Notice of Division that, on its face, reasonably appears to be enforceable.
- (m) The spouses should have the right to revoke a deferred benefit split at any time prior to pension commencement by filing with the plan administrator a Notice of Revocation in a form prescribed by regulation and signed by both spouses.

3. TRANSFER AT TIME OF MARRIAGE BREAKDOWN

(a) INTRODUCTION

Under the Commission's proposals, the member spouse will be entitled to transfer up to fifty percent of the total value of his or her pension, as calculated at the date of filing the Notice of Intention with the plan administrator, to another pension vehicle for the benefit of the non-member spouse.²⁴ A transfer will be

²⁴ The transfer option proposed by the Commission differs in one important aspect from that found in the *Family Relations Act* (B.C.), *supra*, note 5, and recommended by B.C. Report No. 123, *supra*, note 5. Unlike the Ontario proposals, the British Columbia legislation does not include an option for a transfer out of a defined benefit plan at the time of marriage breakdown. In the British Columbia scheme, a transfer to another pension vehicle is available to the non-member spouse only when he or she elects an early retirement date that is not the actual retirement date of the member spouse. This legislation is based on the recommendations of the Law Reform Commission of British Columbia, which declined to recommend the transfer of a share of the commuted value at marriage breakdown because it believed that the commuted value did not represent a fair value of the pension.

available where the pension being divided is an unmatured defined benefit plan or an unmatured defined contribution plan. A transfer will not be available where a plan has matured (that is, where pension payments have already commenced). The amount to be transferred by the plan administrator to another pension vehicle to the benefit of the non-member spouse will be specified as a dollar amount, not as a fractional share.²⁵ This amount will be negotiated between the spouses and will represent the amount of the equalization payment owing to non-member spouse to be paid out of the value of the pension.

One-half of the total value of the pension will be available for transfer, at the time of marriage breakdown, to a prescribed retirement savings arrangement or to the pension fund of another pension plan, where the administrator of the other pension plan agrees to the transfer. The transfer can also be used to purchase a life annuity that does not commence before the earliest date on which a former plan member would have been entitled to receive payment of the pension benefits.²⁶ Prescribed retirement savings arrangements are defined in the

The Ontario Law Reform Commission considered the British Columbia approach, but declined to implement it for several reasons. The Commission shares British Columbia's concerns about the limitations of a commuted value in determining the value of the pension. However, under the Ontario proposals the transfer option is merely a means of settlement, and the commuted value is not determinative of the pension value to be shared with the non-member spouse. Further, it is the Commission's view that the parties often prefer to settle their affairs at the time of marriage breakdown.

The British Columbia legislation also requires that, prior to a transfer on the early retirement date, the non-member spouse become a limited member with all the rights of a member, unless otherwise prescribed: *Family Relations Act*, *supra*, note 5, s. 55.3(2)(c), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 5, at 80. The Ontario Law Reform Commission feels that this is an unnecessary burden on the pension plan.

²⁵ The approach of assigning a dollar amount to the pension on a transfer reflects the approach of the Alberta Institute of Law Research and Reform in Report No. 48, *supra*, note 20, Appendix A, at 107.

The approach taken in the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.1(1) "proportionate share", as en. by S.B.C. 1994, c. 6, s. 8, is to assign a proportionate share of the commuted value of the pension. See, also, B.C. Report No. 123, *supra*, note 5, Regulation 2 of the proposed legislation, at 96.

²⁶ This mirrors the options currently available under the *Pension Benefits Act*, *supra*, note 2, s. 42(1), which allows the transfer of pension value in the following circumstances:

- 42.—(1)(a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
- (b) into a prescribed retirement savings arrangement; or
- (c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan.

regulations to include a life income fund, a locked-in retirement account, a registered retirement income fund (RRIF), and a registered retirement savings plan (RRSP).²⁷

After a transfer, the non-member spouse will lose any further right to the member's pension interest. This corresponds with the provisions of the *Pension Benefits Act*,²⁸ which provide that where a member terminates employment or membership in the plan and transfers his or her interest in the pension to another pension vehicle, the member has no further rights under the plan. In particular, where a non-member spouse transfers his or her interest share out of the plan, he or she has no further right to any pre-retirement and post-retirement death benefits (unless the member has specifically designated the non-member spouse as a beneficiary).

A transfer of a share of the value to satisfy an equalization entitlement will not be available where it would affect the solvency of a plan. Any solvency restrictions on the transfer amount that can be paid to a plan member on termination of employment should also apply to the transfer of pension value to the non-member spouse.²⁹ The plan administrator should be obliged to ensure that a transfer does not violate the solvency requirements of the *Pension Benefits Act*.

The Commission recommends that the proposed pension division-at-source legislation should provide that the amount transferred to satisfy an equalization obligation under the *Family Law Act*

See, also, B.C. Report No. 123, *supra*, note 5, Regulation 9 of the proposed legislation, at 103.

The Commission considered recommending the payment of a cash amount out of the plan, but declined to make such a recommendation for two reasons: it would require amendments to the *Income Tax Act*, R.S.C. 1952, c. 148, as subsequently re-en. by S.C. 1970-71-72, c. 63, and to the *Pension Benefits Act*, before it could be implemented, and it would be contrary to the Commission's desire to preserve the pension assets as retirement income for both spouses.

²⁷ Regulations under the *Pension Benefits Act*, *supra*, note 4, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

²⁸ *Supra*, note 2, s. 42(11).

²⁹ See *Pension Benefits Act*, *ibid.*, s. 42(7), and regulations, *supra*, note 4, s. 19(4)-(9), as am. by O. Reg. 712/92, s. 14. See Alta. Report No. 48, *supra*, note 20, at 23, where the recommendation is made that the plan administrator be responsible for this calculation.

- (a) should be set out as a dollar figure in the Notice of Division;
- (b) should not exceed fifty percent of the total value of the pension as determined at the time of filing the Notice of Intention;
- (c) should be made in accordance with the provisions of the *Pension Benefits Act* respecting transfers on termination of employment; and
- (d) should not violate the solvency restrictions on transfers provided for in section 42 of the *Pension Benefits Act* where that issue is raised by the plan administrator.

The Commission recommends that the proposed pension division-at-source legislation should provide that, once a transfer is effected, the plan administrator should have no further obligation or duty toward the non-member spouse.

(b) CALCULATION OF PENSION VALUE FOR TRANSFER PURPOSES

(i) Defined Benefit Plans

The responsibility for determining the amount available for transfer purposes out of a defined benefit plan to satisfy an equalization payment will fall to the pension plan. The basis of that valuation in the instance of a defined benefit plan should be the Transfer Value Recommendations developed by the Canadian Institute of Actuaries in 1993,³⁰ which are prescribed in regulations to the *Pension Benefits Act* for calculating the commuted value on termination of employment, wind-up of the plan, or death of the member.³¹ Amendments to the regulations under the *Pension Benefits Act*,³² effective January 1, 1994, were promulgated to provide that transfer values not be less than values determined in accordance with the Transfer Value Recommendations.

The CIA Transfer Value Recommendations apply where provincial legislation requires the computation of transfer values to be paid from a pension plan registered under the *Income Tax Act*,³³ and where the method of settlement

³⁰ Canadian Institute of Actuaries, *Recommendations for the Computation of Transfer Values from Registered Pension Plans* (September 1, 1993) (hereinafter referred to as "CIA Transfer Value Recommendations"), reproduced *infra*, Appendix C.

³¹ This conforms with the recommendations of the Law Reform Commission of British Columbia, in Report No. 123, *supra*, note 5, at 81, and those of the Alberta Institute of Law Research and Reform in Report No. 48, *supra*, note 20, at 20.

³² *Supra*, note 4, s. 19(1), as am. by O. Reg. 787/93, s. 1(1).

³³ *Supra*, note 26.

is the payment of a lump sum in lieu of an immediate or deferred pension resulting from death or termination of plan membership.³⁴ The Transfer Value Recommendations also apply “to the determination of a lump sum payment from the pension plan in lieu of an immediate or deferred pension to which a plan member’s former spouse is entitled after an assignment of the member’s pension has been made as a result of divorce, marriage annulment, legal separation or court order”.³⁵

The new Transfer Value Recommendations are considered to be neutral or “fair” values, not biased in favour of either the member or the plan sponsor.³⁶ They include the full benefit entitlement in the calculation of the transfer value, for instance, the value of a death benefit that would have applied before the commencement of a deferred pension.³⁷ The Transfer Value Recommendations also take into consideration optional forms of pensions and optional commencement dates where the member, as of the computation date, has the right to such options and where “such right is contingent on an action which is within the member’s control and where it is reasonable to assume that the member will act so as to maximize the value of the benefit”.³⁸ As a result, where the member has the right to elect an earlier retirement commencement date and the early retirement pension exceeds the amount available on the normal retirement date, the benefit will be included in the value for transfer purposes if it can be assumed that the member would avail himself or herself of it.³⁹

The Transfer Value Recommendations also take into consideration full and partial indexation of pension plans,⁴⁰ as well as increases in pensions that are related to increases in the average wage index.⁴¹ However, anticipatory improvements in benefits, such as an increase in a flat benefit rate or an *ad hoc* improvement in the pension, are not included in the calculation of the commuted value even where there is a history of such improvements.⁴² Similarly, the

³⁴ CIA Transfer Value Recommendations, *supra*, note 30, at 2.

³⁵ *Ibid.*, at 2.

³⁶ *Ibid.*, at 4.

³⁷ *Ibid.*

³⁸ *Ibid.*, at 5.

³⁹ *Ibid.*, at 7.

⁴⁰ *Ibid.*, at 7-8.

⁴¹ *Ibid.*, at 9.

⁴² Saskatchewan Justice, Pension Benefits Branch, *Division of Pension Benefits on Marriage Breakdown* (Regina: October 1994), at 6.

Transfer Value Recommendations do not include benefit accruals resulting from post-separation service and salary increases. There is no salary projection under the Transfer Value Recommendations beyond the date of valuation.⁴³

The Commission suggests that the CIA Transfer Value Recommendations be adopted as the basis for calculating the value of defined benefit plans available for transfer purposes because that method of calculation represents an improvement over previous methods of calculating the commuted value and because it is a calculation that the plan administrator routinely performs. Using a single standard for transfers on marriage breakdown and for termination, death, or plan wind-up under the *Pension Benefits Act* poses less of an administrative burden to the plan. Plans will not be required, under the Commission's proposals, to develop systems for calculating values on marriage breakdown that are different from those currently in use.⁴⁴

The calculation of the commuted value should be made by the plan administrator at the time of filing a Notice of Intention. The calculation will be binding on the parties, and will apply regardless of when a Notice of Division is filed.⁴⁵

Where a defined benefit plan is not yet vested, the *Pension Benefits Act* requires that the value of the pension for termination purposes be equal to member contributions plus an interest factor.⁴⁶ This standard should also apply where the parties wish to divide an unvested pension at source in the form of a transfer.⁴⁷ Therefore, in the case of a division of an unvested pension, the value of the pension for transfer purposes will be equal to member contributions plus an interest factor in accordance with the regulations under the *Pension Benefits Act*.⁴⁸ If the plan is non-contributory, then the value of the plan for transfer purposes will be zero.

⁴³ *Ibid.*

⁴⁴ The commuted value calculation for transfer purposes in no way affects the value of the pension for *Family Law Act* equalization purposes, but only determines the value of the pension asset available to satisfy an equalization payment.

⁴⁵ See, *supra*, this ch., sec. 2(a)(ii) "Notice of Pension Division at Source", for details on the Notice of Division.

⁴⁶ *Supra*, note 2, s. 63(3), (4).

⁴⁷ A benefit split is not available in the case of an unvested pension.

⁴⁸ Regulations under the *Pension Benefits Act*, *supra*, note 4, s. 19, as am. by O. Reg. 629/92, s. 1, O. Reg. 712/92, s. 14, O. Reg. 787/93, s. 1.

The Commission recommends that the proposed pension division-at-source legislation should provide that the value of a defined benefit plan available for transfer purposes should be calculated in accordance with the provisions of the *Pension Benefits Act* that regulate the calculation of the value of defined benefit plans for transfer purposes on termination of the member's employment.

(ii) Defined Contribution Plans

The calculation of the accumulated value of a defined contribution plan available on a transfer should be the responsibility of the plan administrator. The accumulated value of the pension will be determined as of the date a Notice of Division is filed. The share of the non-member spouse will be transferable to a prescribed retirement savings arrangement as defined in the *Pension Benefits Act*, to a locked-in deferred annuity, or to another pension plan with the permission of the other plan.⁴⁹ The accumulated value of the defined contribution plan for transfer purposes should be based on calculations used for valuing defined contribution plans under the *Pension Benefits Act*.⁵⁰

The Commission recommends that the proposed pension division-at-source legislation should provide that the value of a defined contribution plan available for transfer purposes should be calculated in accordance with the provisions of the *Pension Benefits Act* that regulate the calculation of the value of defined contribution plans for transfer purposes on termination of the member's employment.

(c) ADJUSTMENT OF MEMBER'S PENSION AFTER TRANSFER

Where the non-member spouse receives a transfer from the member's pension, the retirement pension benefit of the member must be adjusted to reflect that transfer. While this will be a relatively straightforward exercise in the case of a defined contribution plan, its calculation will be more complex for a defined

⁴⁹ *Pension Benefits Act*, *supra*, note 2, s. 42(1), and regulations, *supra*, note 4, s. 21(1.1), as en. by O. Reg. 409/94, s. 3(1).

⁵⁰ See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.4, as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 5, at 72, 74, 82.

The Law Reform Commission of British Columbia suggested a formula for determining the accumulated value of defined contribution plans. This consisted of the "contributions made to the plan to the credit of the member" and "net investment returns allocated or which are to be allocated in respect ... of the contributions": B.C. Report No. 123, *ibid.*, Regulation 5 of the proposed legislation, at 98.

"[N]et investment returns" was defined as "interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings": B.C. Report No. 123, *ibid.*, s. 55.1 of the proposed legislation, at 74.

benefit plan. It is important that any adjustment of a defined benefit plan penalize neither the member nor the pension plan. While the adjustment should be fair to the member and the pension plan, neither the pension plan nor the member should benefit from a transfer. The method of ensuring that a transfer is cost-neutral to both the plan and the member should be set out in regulations and will vary with the type of plan in question.⁵¹ It would be helpful if standards to accomplish fair results could be developed in consultation with the Canadian Institute of Actuaries.⁵²

The Commission recommends that a method for adjusting the pension interest of the member spouse in a defined benefit plan after a transfer out of the pension plan to satisfy a *Family Law Act* equalization obligation should be provided for in regulations promulgated under the proposed pension division-at-source legislation.

⁵¹ One possible adjustment method for final average earnings plans would be to adjust years of credited service to reflect the transfer. For example, if a non-member spouse receives a transfer of one-half of the commuted value of the pension, then the years of credited service at the date of transfer would be similarly reduced by one-half. Another method would be to determine the member's pension in accordance with the plan and then to reduce that value to reflect the accumulated value of the amount transferred to the spouse at the time of marriage breakdown, with an interest factor based on the rate used at the time of the transfer. For an example of such a provision in the context of federal legislation, see the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.), s. 25(8).

⁵² The British Columbia legislation provides that the adjustment process be developed in the regulations. See the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.96, as en. by S.B.C. 1994, c. 6, s. 8:

55.96 If under this Act a spouse or the spouse's estate receives a share of a member's pension directly from a plan, the interest in the pension of the member, or of any person claiming an interest through the member, must be adjusted in accordance with the regulations.

See, also, B.C. Report No. 123, *supra*, note 5, at 93, and Regulation 4 of the proposed legislation, at 98:

4. Where a spouse or the spouse's estate receives under the Act a separate pension, a transfer of a proportionate share of the commuted value of a pension or a share of benefits under the pension, the plan shall adjust the member's pension or benefits under it, as the case may be, by deducting from it the proportionate share (before the adjustment specified in Regulation 3(c)) transferred to the credit of, or paid to, the spouse.

See, also, B.C. Report No. 123, *ibid.*, Regulation 3(c) of the proposed legislation, at 97, as follows:

3. A separate pension in favour of a limited member under s. 55.5 of the Act must be

....

(c) adjusted in accordance with actuarial principles to take into account any difference between the age of the member and the limited member.

4. BENEFIT SPLITS

(a) INTRODUCTION

The second form of pension division at source proposed by the Commission as a means of satisfying a *Family Law Act* equalization entitlement is a benefit split. As was explained earlier in this chapter, a benefit split is a device that provides for a monthly payment from the pension plan to the non-member spouse, commencing at the time of retirement. The nature of a benefit split will vary, depending on whether a pension plan is matured or unmatured.⁵³ The non-member spouse will be entitled to a benefit split in three different situations: first, on the division of a matured defined benefit plan (immediate benefit split); second, on the division of a matured defined contribution plan (immediate benefit split); and third, on the division of an unmatured defined benefit plan (deferred benefit split).

On a benefit split, the non-member spouse will not be entitled to any supplemental benefits available to the member. Supplemental benefits can include supplementary hospital benefits, drugs, private-duty nursing, paramedical services, medical supplies and appliances, ambulance services, out-of-country emergency hospital and medical expenses in excess of the amount reimbursable under provincial plans, vision care, hearing aids, and dental services.⁵⁴ The splitting of these types of benefits between the member and the non-member spouse would be administratively complex and would present an additional cost to the plan.

Pension plans should not be placed in the position of administering pensions of a low value to a non-member spouse on a benefit split. In certain circumstances, the *Pension Benefits Act* provides for a cash payment of the commuted value in lieu of a periodic pension benefit. Where the annual benefit payable at the normal retirement date is not more than two percent of the Year's Maximum Pensionable Earnings (YMPE) in the year that the former member terminated employment, the *Pension Benefits Act* provides that the plan may require the commuted value to be paid to the former member.⁵⁵ The YMPE is a

⁵³ This reflects the British Columbia legislation: see *Family Relations Act* (B.C.), *supra*, note 5, s. 55.5, as en. by S.B.C. 1994, c. 6, s. 8. See, also, the recommendations of the Law Reform Commission of British Columbia in Report No. 123, *supra*, note 5, at 82.

⁵⁴ Lawrence E. Coward, *Mercer Handbook of Canadian Pension and Benefit Plans*, 10th ed. (North York, Ont.: CCH, 1991), at 195 (hereinafter referred to as "*Mercer Handbook*").

⁵⁵ *Pension Benefits Act*, *supra*, note 2, s. 50(1). See, also, *Pension Benefits Standards Act*, 1985, *supra*, note 51, s. 26(3), and *Family Relations Act* (B.C.), *supra*, note 5, s. 55.91, as en. by S.B.C. 1994, c. 6, s. 8:

term used under the *Canada Pension Plan*⁵⁶ to describe the maximum earnings on which contributions are deducted under the plan.⁵⁷ The YMPE is adjusted annually in step with changes in the average industrial wage in Canada.⁵⁸ The YMPE for 1994, for example, is \$34,400, and two percent of that amount is \$688. If the value of the annual benefit is less than \$688, the plan may pay out the commuted value to the member.⁵⁹ The payment is made in cash.

The Commission recommends that the proposed pension division-at-source legislation should provide that the plan administrator may pay out a cash settlement in lieu of a benefit split to a non-member spouse where the value of the annual benefit payable to the non-member spouse is under the threshold for administration in accordance with section 50 of the *Pension Benefits Act*.

(b) DEFERRED BENEFIT SPLITS

(i) Introduction

In this report, the Commission proposes two types of benefit split: deferred and immediate. Where the pension is a defined benefit plan that is not yet matured, the spouses will have the option of satisfying an equalization entitlement under the *Family Law Act*⁶⁰ through a deferred benefit split. Where the non-member spouse opts for a deferred benefit split, he or she will be entitled to a share or a fractional interest of the final retirement value of the pension benefit. The retirement value of the pension benefit will be equivalent to the actuarial value of the pension under the normal form of the pension on the member's actual retirement date. The plan administrator will administer one benefit until the member's actual retirement date. Only after the member retires and the pension commences will the plan administer two separate benefits. The

55.91 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the pension, a plan may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share of the benefits, as the case may be, in the same manner that a plan can require a member to do so under section 40(1) of the *Pension Benefits Standards Act*.

See, also, B.C. Report No. 123, *supra*, note 5, at 88.

⁵⁶ R.S.C. 1985, c. C-8.

⁵⁷ *Pension Benefits Act*, *supra*, note 2, s. 1 "Year's Maximum Pensionable Earnings".

⁵⁸ Canada Pension Plan Regulations, C.R.C. 1978, c. 385, s. 85, as am. by SOR/87-719, Schedule, s. 1; SOR/90-29, Schedule, s. 41.

⁵⁹ Saskatchewan Justice, Pension Benefits Branch, *supra*, note 42, at 12.

⁶⁰ *Supra*, note 1, s. 5.

retirement value of the plan will include all post-separation plan improvements, indexing (whether contractual or otherwise), salary increases, increases in years of service, buy-backs, bridging benefits, and voluntary contributions.

(ii) General Rights of Non-Member Spouse on Deferred Benefit Split

A deferred benefit split will result in certain rights accruing to the non-member spouse, including the right to receive, on the member's retirement, a payment representing the interest of the non-member spouse in the member's pension, with the appropriate deductions, directly from the plan.⁶¹ Prior to the retirement of the member and the commencement of the pension payments to the non-member spouse, the rights of the non-member spouse are as prescribed by law, and the non-member spouse will not have the same rights as "members" or "former members" under the *Pension Benefits Act*.⁶² For example, the non-member spouse will not have the same rights regarding voting, elections, or pre-retirement death benefits as a member or even a former member.⁶³ Until the pension commencement date, the member will have the right to make all elections, to vote as he or she sees fit, or to make any appropriate designations with respect to his or her pension asset. Thereafter, the non-member spouse will be treated as a member for the purposes of the pension interest and will be

⁶¹ While s. 153 of the *Income Tax Act*, *supra*, note 26, as am. by S.C. 1973-74, c. 30, s. 22; 1976-77, c. 4, s. 62; 1977-78, c. 32, s. 39; 1979, c. 5, s. 53; 1980-81-82-83, c. 48, ss. 86, 115; 1980-81-82-83, c. 109, s. 19(3); 1980-81-82-83, c. 140, s. 104; 1985, c. 45, s. 87; 1987, c. 46, s. 51; 1991, c. 49, s. 126; 1993, c. 24, s. 91(1); 1994, c. 8, s. 21; 1994, c. 21, s. 77, does not specifically authorize a plan administrator to withhold income tax from the non-member spouse's share of the pension payment, a recent income tax bulletin has authorized that practice in the case of a separating spouse.

Revenue Canada, in Interpretation Bulletin IT-499R, published on January 17, 1992, addresses the subject of pension payments on marriage breakdown (para. 11). The position taken by Revenue Canada is that, where there is a division of pension benefits pursuant to provincial law on a marriage breakdown, the portion received by each spouse or former spouse is included in the income of that spouse as a pension benefit under s. 56(1)(a)(i), as am. by 1974-75-76, c. 26, s. 27(1); 1974-75-76, c. 58, s. 12(1); 1976-77, c. 4, s. 87, Sched. II; 1979, c. 5, s. 15(1); 1980-81-82-83, c. 48, s. 25; 1980-81-82-83, c. 140, s. 26; 1983-84, c. 1, s. 23(1); 1987, c. 46, s. 15(1); 1991, c. 49, s. 32: Interpretation Bulletin IT-499R, *ibid.*, at 6.

⁶² *Supra*, note 2, s. 1 "former member", "member". Compare *Family Relations Act* (B.C.), *supra*, note 5, s. 55.3(2)(c), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 5, at 80.

⁶³ Former members are individuals who are eligible for a deferred pension under the terms of the plan: see *Pension Benefits Act*, *supra*, note 2, s. 1 "former member".

entitled to make all elections and decisions with respect to his or her pension interest.⁶⁴

The member spouse, on a deferred benefit split, will be entitled to deal with his or her pension in a manner independent of the wishes of the non-member spouse. The member's rights under the pension plan will not be affected by the deferred benefit split except to the extent provided for in the Commission's proposals. However, until the pension commencement date and the creation of a separate pension for the non-member spouse, the member spouse must conduct himself or herself in a manner that ensures that the pension benefit due and owing to the non-member spouse is not jeopardized. If this duty is not met, the member should be personally liable to the non-member spouse for loss occasioned by the member's behaviour.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split,

- (a) prior to the commencement of pension payments and the creation of a separate pension for the non-member spouse, the member spouse should retain all rights under the pension plan except to the extent modified by the Commission's recommendations; and
- (b) after the commencement of pension payments and the creation of a separate pension for the non-member spouse, the member spouse should retain all rights under the pension plan with respect to his or her remaining share of the pension.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, after the commencement of pension payments and the creation of a separate pension for the non-member spouse, the non-member spouse should have the rights of a

⁶⁴ See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.3(3), as en. by S.B.C. 1994, c. 6, s. 8:

55.3—(3) Subject to an order of the Supreme Court, a designation of preretirement survivor benefits or postretirement survivor benefits under the member's pension in favour of a limited member may not be changed without the limited member's consent.

See, also, B.C. Report No. 123, *supra*, note 5, at 81. The Alberta Institute of Law Research and Reform, in Report No. 48, *supra*, note 18, Recommendation No. 12, at 31, also recommended that the non-member spouse's approval be obtained for elections:

We recommend that upon a division of proceeds an employee spouse should make elections under the pension plan only with the agreement of the non-employee spouse or the approval of the Court, but that if the election relates to the employee spouse's employment, the Court should not withhold its approval unless it is satisfied that the election is not made in good faith.

member under the *Pension Benefits Act*, except to the extent modified by the Commission's recommendations.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, where the member spouse acts deliberately to jeopardize the interest of the non-member spouse in the pension plan prior to the pension commencement date, the member spouse should be personally liable for any loss occasioned by his or her behaviour.

(iii) Division of Member's Pension

The plan administrator is responsible for dividing the member's pension between the member and the non-member spouse based on the fractional interest set out in the Notice of Division. The fractional interest represents the share of the member spouse's pension that has been assigned to the non-member spouse to satisfy an equalization entitlement. The actuarial value of the member's pension at the time of pension commencement will be calculated by the plan administrator, and that value will be divided between the member and the non-member spouse based on the fractional interest. The fraction cannot exceed one-half because of the fifty-percent rule.

The Commission is reluctant to recommend a specific formula for determining the fractional interest, and under the Commission's proposals, calculation of the fractional interest will be left to negotiation between the spouses.⁶⁵ One possible method of calculation would be to divide the amount of

⁶⁵ See B.C. Report No. 123, *supra*, note 5, Regulation 2 of the proposed legislation, at 96, regarding proportionate shares:

2. Where the Act under sections 55.5(a), 55.6(1), 55.7(1), 55.7(3), 55.8, or 55.9 or the Regulations requires a determination of a proportionate share of a pension, a benefit, or the commuted value of a pension, the proportionate share must be determined by the following formula:

- (a) half of the pensionable service accumulated by the member from the date of marriage to the date the spouse becomes entitled to an interest in family assets under Part 3,

divided by

- (b) the total pensionable service accumulated by the member to the date
 - (i) the spouse's share is transferred from the plan,
 - (ii) the spouse begins to receive a separate pension, or
 - (iii) the spouse begins to receive a payment of benefits from the member or the plan

as the case may be.

the equalization entitlement by the total retirement value of the pension.⁶⁶ For example, if the equalization entitlement owing is \$100,000 and the total retirement value of the pension is \$500,000, then the appropriate fractional interest is one-fifth.

The Commission proposes that the form of the non-member spouse's separate pension on a deferred benefit split be the normal form under the pension plan. The normal form of a pension is the default form under the plan where the member makes no election as an alternative form of death benefits.⁶⁷ The non-member spouse should be entitled to make any elections available under the terms of the pension plan except those relating to a joint-and-survivor pension. The Commission's view is that the joint-and-survivor form should not be available to the non-member spouse.⁶⁸ The rights of the member spouse under the plan will not be affected by the Commission's proposals.

The pension payments to the non-member spouse will be adjusted in accordance with actuarial principles to take into account the age of the non-member spouse.⁶⁹ Because the non-member spouse on a deferred benefit split

See, also, *Rutherford v. Rutherford* (1981), 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.), where the Court calculated the pension payable to the non-member spouse on the basis of the following formula, set out in *Marsham v. Marsham* (1987), 59 O.R. (2d) 609, at 629, 7 R.F.L. (3d) 1, at 24 (Appendix):

$$\frac{\text{number of months of contributions to the pension plans during the period parties cohabited within marriage}}{\text{total number of months of contributions to the pension plans}} \times \frac{\text{benefits payable}}{2}$$

⁶⁶ This value will be calculated for equalization purposes under the *Family Law Act*, *supra*, note 1, s. 5.

⁶⁷ In the commentary to Regulation 3 of the proposed legislation, in Report No. 123, *supra*, note 5, at 97, the Law Reform Commission of British Columbia stated:

The "normal" form of pension is a well understood term. It is the pension that will be paid under the plan if the member makes no election on retirement.

⁶⁸ See discussion *infra*, this ch., sec. 4(b)(viii), "Post-Retirement Death Benefits".

⁶⁹ The Law Reform Commission of British Columbia took a similar approach in Report No. 123, *supra*, note 5, Regulation 3 of the proposed legislation, at 97, as follows:

3. A separate pension in favour of a limited member under s. 55.5 of the Act must be

- (a) a single life pension,
- (b) based on a proportionate share of the pension the member would have received had there been no division under this Part and had the member elected a pension in the unadjusted normal form provided under the plan, and

will have, in effect, his or her own pension, payments to the non-member spouse will not be affected by the post-retirement death of the member spouse. Under current *Pension Benefits Act* provisions⁷⁰ for plan-administered "if and when" arrangements, where a member spouse dies after retirement, all benefits payable to the non-member spouse cease. Court orders and domestic contracts have attempted to deal with this eventuality by requiring the member spouse to take out a life insurance policy with the non-member spouse as beneficiary, or to assign post-retirement death benefits to the non-member spouse where that option is available under the terms of the pension plan. These provisions have been of limited utility, because it is often difficult to obtain the required insurance, and many plans do not provide for post-retirement death benefits aside from joint-and-survivor pensions, which by statute are not available to former spouses in most circumstances.⁷¹

Currently, under section 51(4) of the *Pension Benefits Act*,⁷² provision is made for revaluing a pension after an order or domestic contract "affects" the pension "in the prescribed manner". However, no regulations have ever been promulgated under this subsection. In the Commission's view, this is a deficiency

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- (c) adjusted in accordance with actuarial principles to take into account any difference between the age of the member and the limited member.

The separate pension recommended by the Law Reform Commission of British Columbia is a single life pension. For the purposes of the division, the member's pension is calculated in the normal form provided under the plan (that is, where the member makes no elections on retirement). The amount payable to both the member and the non-member spouse is adjusted to take into account the difference in age between the member and the non-member spouse.

⁷⁰ *Supra*, note 2, s. 51.

⁷¹ Joint-and-survivor pensions are not available where the member is living separate and apart from his or her spouse on the date of retirement, or where the member and the spouse sign a written waiver: *Pension Benefits Act*, *ibid.*, ss. 44(1), (4), 46(1).

While the courts in Ontario have not been willing to consider death benefits in the calculation of net family property, they have been included in the creation of "if and when" arrangements. In such arrangements it is possible for the member to die before retiring, thereby defeating the former spouse's right to pension entitlement. In an attempt to protect the former spouse's interest, the courts have ordered that the former spouse be named as a beneficiary of the member's death benefits or that a proportionate interest in the death benefits be awarded to the former spouse. For example, in both *Porter v. Porter* (1986), 1 R.F.L. (3d) 12 (Ont. Dist. Ct.), at 26-27, and *Storms v. Storms* (1988), 14 R.F.L. (3d) 317 (Ont. Dist. Ct.), at 325-26, the Court ordered that, in the event that the husband predeceased the wife prior to receiving his pension, the wife would be entitled to an interest calculated by multiplying the death benefits by a fraction, the numerator of which would be the number of months of married cohabitation during which pension contributions were made, and the denominator of which would be the total number of months during which pension contributions were made, to the date of death.

⁷² *Supra*, note 2.

of the current regime, and we therefore suggest that a method of determining the value of the member's interest in the pension after a deferred benefit split be set out in regulations. For obvious reasons, it would be desirable to draw on the expertise of the Canadian Institute of Actuaries in developing these regulations. One possible method for determining the member's final entitlement would be to subtract the actuarial value of the pension payable to the non-member spouse as a result of the benefit split from the actuarial value of the pension at pension commencement. The actuarial value of the non-member spouse's pension plus the actuarial value of the member spouse's pension should equal the total retirement value of the pension. The plan administrator should be required, after effecting a deferred benefit split, to provide both spouses with an accounting of the distribution of funds and recalculation of benefits.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, the plan administrator, at the time of the member's retirement, should be required to

- (a) obtain an actuarial valuation of the member's pension as of the pension commencement date of the member spouse;
- (b) determine the non-member's share by applying the fractional interest as set out in the Notice of Division to the actuarial value of the member's pension;
- (c) transfer the non-member's share of the member's pension to a separate account in the pension plan in the name of the non-member spouse;
- (d) provide a separate pension to the non-member spouse based on the normal form under the pension plan, unless the normal form is a joint-and-survivor form;
- (e) pay to the non-member spouse a monthly pension benefit actuarially valued over the life of the non-member spouse;
- (f) adjust the value of the member's pension in accordance with the regulations; and
- (g) after payment of the pension commences, provide an accounting to both spouses with respect to the recalculation of benefits.

(iv) Pension Commencement Date

a. Current Law in Ontario

Under the provisions of the *Pension Benefits Act*⁷³ for plan-administered “if and when” arrangements, payments to the non-member spouse commence on the actual retirement date of the member or on the normal retirement date of the member or former member, whichever is earlier. In developing a pension division-at-source scheme, the Commission was required to consider the appropriateness of these provisions. The date on which a member’s pension commences has a significant impact on the value of his or her pension. The *Pension Benefits Act* requires that plans provide for three possible pension commencement dates: an early retirement date, a normal retirement date, and a delayed retirement date (it is also open to the plan to specify a retirement date that is more beneficial to the member than any of these three dates). Most members retire sometime between the early and the normal retirement dates.

The *Pension Benefits Act* provides that plans registered in Ontario on or after January 1, 1988 have a normal retirement date of no later than one year after the member reaches the age of sixty-five.⁷⁴ For plans registered or submitted for registration prior to January 1, 1988, the normal retirement date for benefits accrued after that date is deemed to be no later than one year after the member reaches the age of sixty-five, unless the plan specifies an earlier date.⁷⁵ Early retirement is available to members who are vested and are within ten years of the normal retirement date.⁷⁶ The member may elect for early retirement benefits to commence any time during the ten-year period prior to his or her normal retirement date.⁷⁷

b. Recommendations for Reform

The Commission considered a number of approaches to determining the appropriate pension commencement date for a non-member spouse on a deferred benefit split. One approach would be to allow the non-member spouse to choose a pension commencement date independent of the member’s pension commencement date. The non-member spouse could then select the date best

⁷³ *Ibid.*, s. 51.

⁷⁴ *Ibid.*, s. 35(1).

⁷⁵ *Ibid.*, s. 35(2).

⁷⁶ *Ibid.*, s. 41(2).

⁷⁷ *Ibid.*, s. 41(5).

suited to his or her circumstances.⁷⁸ The Commission decided against independent pension commencement dates because such a scheme would be too complex to administer. Normally, the retirement date chosen by the member determines the retirement value of the pension.⁷⁹ If a non-member spouse has the right to elect to have his or her pension payments begin on a date different from that of the member, problems will arise, particularly where an unreduced early retirement benefit is available.

Where an unreduced early retirement benefit is available, a non-member spouse will likely elect the earliest retirement date because of the enhanced value of the unreduced early retirement benefit. However, valuing the pension for division purposes based on the early retirement date would impose an additional funding obligation on the plan since, in normal circumstances, not all members take advantage of the full unreduced early retirement benefit. In fact, most members retire sometime between the early and normal retirement dates because they cannot afford to retire early, or because they simply wish to continue working. Permitting a non-member spouse to benefit from unreduced early retirement provisions when the member spouse has not elected to retire early would require the pension plan to pay out more benefits than it would have paid had there been no marriage breakdown.⁸⁰

⁷⁸ The possible pension dates are tied to the member (for example, his or her early retirement age). The Commission did not consider allowing an early retirement date based on the age of the non-member spouse.

⁷⁹ In chapter 5 of this report, *supra*, dealing with the valuation of pensions under the *Family Law Act*, *supra*, note 1, the Commission recommended that in actuarial valuations of the pension asset, a retirement date that is halfway between the early retirement date on which an unreduced pension is available and the normal retirement date should be used as the retirement commencement date. The issue being examined here is different and concerns when the non-member spouse should be allowed to commence his or her pension payments. The method of determining the appropriate pension commencement date for pension division at source purposes has no effect on the value of the pension for *Family Law Act* equalization purposes.

⁸⁰ As a method of avoiding imposing an additional funding obligation on the pension plan, the Commission considered valuing the pension as of the member's actual pension commencement date, which would be later than the non-member's early retirement date, and removing the non-member's share from the member's pension entitlement at the member's actual pension commencement date. When based on the member's later retirement, the total value of the member's pension would be lower than its value on the date on which the non-member spouse retired (the unreduced early retirement date). The Commission rejected this approach because the deduction of the non-member spouse's enhanced share from the value of the member's pension would result in the member being penalized. The following example illustrates how this might occur:

Impact on plan if no separation (assuming retirement age of 55)	=	value of pension, \$106,000
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The Commission also considered the possibility of allowing the non-member spouse to retire on the early retirement date independently of the member, without including the value of the unreduced early retirement benefit in the value of the pension benefit available to be distributed to the non-member spouse. In this instance, the pension would be actuarially valued based on the pension value at the early retirement date, without the inclusion of the enhanced early retirement benefit. The non-member spouse would then receive an actuarially reduced early retirement pension equal in value to his or her portion of the pension payable at the normal retirement date. The disadvantage of this approach is that it would result in an artificially low value being placed on the pension, thereby penalizing the non-member spouse, who would receive a predetermined portion of that value.⁸¹ Accordingly, the non-member spouse could only benefit from unreduced early retirement benefits if he or she delayed the commencement of his or her pension until the member's retirement.

On reflection, the Commission concluded that providing for independent pension commencement dates for member and non-member spouses is not desirable.⁸² A preferable approach, in our view, is the one found in section 51 of

Impact on plan if no separation (assuming retirement age of 60)	=	value of pension, \$68,000
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If non-member spouse retires at age 55 and has 50% interest in pension benefit, he or she is entitled to 50% x \$106,000	=	\$53,000
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However, if member retires at age 60, pension is valued at \$68,000; therefore member's share is \$68,000 - \$53,000	=	\$15,000
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When the non-member's share is deducted from the member's pension, the member is left with \$15,000 instead of \$34,000, or a little more than one-fifth of his or her original pension.

⁸¹ Assume, for example, that the non-member spouse retires at the early pension commencement date without the benefit of the unreduced early retirement benefit and that the pension is valued at \$54,000 on that basis. If the non-member spouse's share is fifty percent, the non-member spouse is entitled to a pension valued at \$27,000 ($\$54,000 \times 50\% = \$27,000$). If the member actually retires at the age of fifty-eight with the pension valued at \$80,000, and the non-member spouse waits until that date to receive pension payments, then the non-member spouse is entitled to a pension valued at \$40,000 instead of \$27,000 ($\$80,000 \times 50\% = \$40,000$).

⁸² The Commission declined to follow the approach found in the British Columbia legislation with respect to pension commencement dates. See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.5, as en. by S.B.C. 1994, c. 6, s. 8:

the *Pension Benefits Act*,⁸³ which ties the pension commencement date of the non-member spouse to that of the member spouse, with the proviso that where the member does not receive his or her pension on the normal retirement date, the non-member spouse will be entitled to receive payments under the plan on that date.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, periodic payments for the non-member spouse should commence on the date on which the member elects to have his or her pension payment commence, and that, where the member has not retired by the normal retirement commencement date, the non-member spouse should be entitled to have his or her payments commence at the normal commencement date.

55.5 If a pension to be divided is in a local plan and has not matured and the plan is a defined benefit plan, a spouse, by delivering a notice in the prescribed form to the administrator,

- (a) is entitled to have, before the member retires, a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse at any time the member is eligible to retire, or
- (b) is entitled to receive, when the member retires, a separate pension from the plan determined in accordance with the regulations.

The approach adopted in the British Columbia legislation is based on the recommendations of the Law Reform Commission of British Columbia and allows the non-member spouse the option of transferring the commuted value out of the plan on the early retirement date to another locked-in pension vehicle, where that is not the member's actual retirement date. The commuted value recommended by the Law Reform Commission of British Columbia is based on the same calculation used under the *Pension Benefits Standards Act*, S.B.C. 1991, c. 15: see B.C. Report No. 123, *supra*, note 5, at 82-83.

The Ontario Law Reform Commission decided against the British Columbia approach on the basis that the parties might prefer to have the transfer option at the time of marriage breakdown rather than at the early retirement date. Further, deferring a transfer to the later date would be unnecessarily burdensome to the plan, since the non-member spouse would require special status as a limited member under the plan until the transfer is effected. Permitting transfers of the commuted value on the early retirement date may also have unattractive funding implications for the plan.

In its Report No. 48, *supra*, note 20, at 25, the Alberta Institute of Law Research and Reform suggested that the non-member spouse's pension commence on a date set by a judge in an order:

For the sake of efficiency, we think that the matrimonial property order should deal with the commencement date of the separate pension. It could provide that the non-employee spouse's separate pension will commence on the first date on which the employee spouse could claim a pension. Alternatively, it could provide that the separate pension will commence on the earlier of a specified date and the date upon which the employee spouse's pension starts.

(v) Termination of Employment by Member Spouse
a. Current Law in Ontario

It is of considerable importance that the interest of the non-member spouse be protected where the member voluntarily or involuntarily terminates employment before the full retirement value of the pension is achieved. The provisions in section 51 of the *Pension Benefits Act* for plan-administered "if and when" arrangements attempt to provide some security for the non-member spouse in the event of the member's termination of employment. The *Pension Benefits Act*⁸⁴ provides that, where a certified copy of a domestic contract or order evidencing a plan-administered "if and when" arrangement is filed with a plan administrator, the plan administrator is required to provide the non-member spouse with notice of the options available to the member on termination of employment. The non-member spouse must be given notice of the termination within thirty days of the administrator being notified that the member has terminated employment.⁸⁵

The provisions of the Act set out several options for members on termination of employment. Effective January 1, 1988, where a member terminates employment and has a vested pension but is not eligible to receive immediate benefits, he or she may elect to transfer the commuted value of the pension to a prescribed retirement savings arrangement, to a new pension plan if so permitted by the recipient plan, or to the purchase of a deferred annuity, commencing, at the earliest, on the early retirement date specified in the plan.⁸⁶ The former member must make his or her election known to the administrator within sixty days following termination of employment.⁸⁷

Where the plan was registered before January 1, 1988, and where benefits were earned before that time, the plan may provide that vested members whose employment is terminated will receive payment of a maximum of twenty-five percent of the commuted value of their deferred pension.⁸⁸ The commuted value of the deferred pension must be determined in accordance with the Transfer Value Recommendations of the Canadian Institute of Actuaries.⁸⁹ Prior to

⁸⁴ *Supra*, note 2, s. 51(5).

⁸⁵ Regulations under the *Pension Benefits Act*, *supra*, note 4, s. 46.

⁸⁶ *Pension Benefits Act*, *supra*, note 2, s. 42(1), (3), and regulations, *supra*, note 4, s. 21(1.1), (5), as en. by O. Reg. 409/94, s. 3(1), (6).

⁸⁷ Regulations under the *Pension Benefits Act*, *ibid.*, s. 20(1).

⁸⁸ *Pension Benefits Act*, *supra*, note 2, s. 50(2).

⁸⁹ *Supra*, note 30.

transferring moneys out of the pension fund, the plan administrator must ensure that the transfer will not impair the solvency of the fund.⁹⁰

b. Recommendations for Reform

The provisions of the *Pension Benefits Act* that attempt to protect the interest of the non-member spouse under a plan-administered “if and when” arrangement on the member’s termination of employment are deficient in many respects. For example, the provisions do not explicitly apply to former spouses. They also do not set out precisely what interest the non-member spouse will have in any options available on the member’s termination. In addition, it is also not clear whether the fifty-percent rule applies to payments to the non-member spouse on the member’s termination.⁹¹

The Commission wishes to make improvements to these provisions by creating clearer rights for non-member spouses on the member’s termination of employment. Under the Commission’s proposals, where the member terminates employment, the non-member spouse will be entitled to a portion of the commuted value of the pension,⁹² if that option is chosen by the member, or to a share of any deferred pension accruing to the member at the date of termination, if no transfer is effected.⁹³ The non-member spouse’s entitlement to the termination benefit will be based on the non-member spouse’s fractional interest in the member’s pension benefit as set out in the Notice of Division.⁹⁴

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, where the member’s employment is terminated on a voluntary or involuntary basis prior to the pension commencement date, the non-member spouse should be entitled to a share of the termination benefit based on the fractional interest of the non-member spouse in the member’s pension as set out in the Notice of Division.

⁹⁰ *Pension Benefits Act*, *supra*, note 2, s. 42(7).

⁹¹ For a more detailed discussion of these provisions, see *supra*, ch. 3, sec. 5(b) “Violations of Fifty-Percent Rule”.

⁹² It is contemplated that this calculation should be the same as that currently set out in the regulations under the *Pension Benefits Act*, *supra*, note 4, s. 19(1), as am. by O. Reg. 787/93, s. 1(1).

⁹³ *Pension Benefits Act*, *supra*, note 2, s. 37.

⁹⁴ See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.3(2)(a), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 5, Regulation 2 of the proposed legislation, at 96. Under the British Columbia legislation, a limited member is entitled to a proportionate share of all benefits paid under the pension, including those paid on termination of employment.

(vi) Termination of Plan

a. Current Law in Ontario

In addition to protecting the interests of the non-member spouse on termination of the member's employment, it is also necessary to protect the interests of the non-member spouse in the event that the plan is wound up. The current provisions of the *Pension Benefits Act* respecting plan-administered "if and when" arrangements contemplate a transfer of a share of a wind-up benefit to a non-member spouse.⁹⁵ The member spouse may assign an interest in a wind-up benefit payable under section 73(2) of the Act to a non-member spouse. The member may assign an interest in his or her pension by virtue of an order under the *Family Law Act*⁹⁶ or by a domestic order as defined in Part IV of the *Family Law Act*.

The types of benefits available to members on a plan insolvency are set out in the *Pension Benefits Act*, which requires, on the wind-up of a pension plan, that the administrator provide each person entitled to a pension, deferred pension, or other benefit with a statement setting out the person's entitlement under the plan and the options available to that person.⁹⁷ Where an election is available, the person is required to make the election within a prescribed time period, failing which he or she is deemed to have elected to receive, if eligible, immediate payment of a pension benefit, or, if not eligible, a pension commencing on the earliest date allowable under section 74 of the *Pension Benefits Act*.⁹⁸

The *Pension Benefits Act* requires that the amount of benefits on a wind-up be determined by deeming the employment of each member to have been terminated as of the effective date of the wind-up, as if the member had satisfied all eligibility conditions for a deferred pension.⁹⁹ Members who are not receiving a pension as of the date of a wind-up are entitled to transfer the commuted value to another pension vehicle.¹⁰⁰ In addition, where the member's age plus years of service equals at least fifty-five, the member has the right to receive a pension beginning on the earlier of the normal retirement date or the date on which the

⁹⁵ *Pension Benefits Act*, *supra*, note 2, s. 65(3).

⁹⁶ *Supra*, note 1, s. 9.

⁹⁷ *Pension Benefits Act*, *supra*, note 2, s. 72(1).

⁹⁸ *Ibid.*, s. 72(2).

⁹⁹ *Ibid.*, s. 73(1).

¹⁰⁰ *Ibid.*, s. 73(2).

member would be entitled to an unreduced pension if the plan were not wound up.¹⁰¹

b. Recommendations for Reform

The current provisions in the *Pension Benefits Act* respecting plan-administered “if and when” arrangements do not satisfactorily address the position of the non-member spouse in the event of a plan wind-up. They say little about the nature of the interest to be transferred to the non-member spouse on a plan wind-up, the application of the fifty-percent rule to such a transfer, whether the provisions apply to former spouses, the procedure for a transfer on a wind-up, and the rights of the non-member spouse.

To ensure that the interests of the non-member spouse are protected,¹⁰² the Commission proposes that, in the event of a plan wind-up prior to the commencement of a deferred benefit split, the non-member spouse be entitled to a share of the benefits of whichever option the member spouse elects.¹⁰³ The share will be based on the fractional interest of the non-member spouse in the pension benefit as set out in the Notice of Division.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, in the event of the wind-up of the pension plan before the pension commencement date, the non-member spouse should be entitled to a payment of a share of any wind-up benefit paid to the member based on the fractional interest of the non-member spouse in the member’s pension as set out in the Notice of Division.

(vii) Pre-Retirement Death Benefits

a. Current Law in Ontario

The Commission has attempted to develop a scheme for deferred benefit splits that protects the non-member spouse’s interest in the pension plan in the event of the member’s pre-retirement death. In our view, the provisions for plan-administered “if and when” arrangements under section 51 of the *Pension*

¹⁰¹ *Ibid.*, s. 74(1).

¹⁰² The non-member spouse should also have his or her pension interest recognized where the plan sponsor sells, assigns, or disposes of the entire business or a portion of the business: *ibid.*, s. 80.

¹⁰³ Where a plan winds up after the commencement of a deferred benefit split, the non-member spouse will have the same rights as a member on a plan wind-up.

*Benefits Act*¹⁰⁴ do not adequately protect the rights of the non-member spouse in this situation. While the non-assignability provisions permit, as an exception, assignability in the event of the pre-retirement death of a member spouse,¹⁰⁵ death benefits are rarely assigned to non-member spouses because of section 48(1) of the *Pension Benefits Act*, which provides for death benefits for surviving spouses. Section 48(1) has been interpreted by some as entitling a surviving spouse to a death benefit in priority to all other potential beneficiaries, including former spouses with interests under plan-administered “if and when” arrangements.¹⁰⁶

Minimum standards that plans must comply with in providing death benefits are set out in the *Pension Benefits Act*. The statute requires that plans provide for pre-retirement death benefits, in the form of a lump sum or a deferred pension. Where a member is vested and dies before the commencement of the pension, his or her surviving spouse is entitled, with respect to post-1986 accruals, to receive a lump sum equal to the commuted value of the deferred pension.¹⁰⁷ In lieu of a lump sum, the surviving spouse may elect an immediate or deferred life annuity, the commuted value of which is at least equal to the commuted value of the member’s post-1986 deferred pension.¹⁰⁸ The statutory minimum for pre-1987 death benefits is a return to the surviving spouse of the member’s contributions, with interest, in respect of the member’s service before January 1, 1987.¹⁰⁹ If the plan is non-contributory, the pre-1987 accruals can be zero.

If, at the time of the member’s death, there is no surviving spouse, or if the surviving spouse waived, in writing, his or her entitlement to the death benefit, then a lump-sum death benefit will be paid to a designated beneficiary or to the

¹⁰⁴ *Supra*, note 2. The non-member spouse, who is the former spouse, should be distinguished from a surviving spouse, who is a subsequent spouse.

¹⁰⁵ An assignment can be made where there is a pre-retirement death benefit in the form of an immediate or deferred pension under s. 48(1)(b) of the Act: *ibid.*, s. 65(3).

¹⁰⁶ The interest of the surviving spouse is said to have priority even though s. 48(13) of the *Pension Benefits Act*, *ibid.*, provides that any entitlement to a pre-retirement death benefit payable to a former spouse under an “if and when” arrangement has priority:

48.—(13) An entitlement to a benefit under this section is subject to any right to or interest in the benefit set out in a domestic contract or an order referred to in section 51 (payment on marriage breakdown).

See, however, discussion *supra*, ch. 3, sec. 4(c) “Obligations Imposed on Plan Administrator in Event of Member Spouse’s Death Prior to Retirement”.

¹⁰⁷ *Ibid.*, s. 48(1)(a), (2)(a).

¹⁰⁸ *Ibid.*, s. 48(1)(b), (2)(b).

¹⁰⁹ *Ibid.*, s. 63.

member's estate.¹¹⁰ Where there is a surviving spouse, he or she must make an election within the prescribed period or will be deemed to have elected to receive an immediate pension.¹¹¹

The minimum required death benefit under the *Pension Benefits Act* for benefits earned or granted on or after January 1, 1987 is greater than the death benefit required with respect to pension credits earned or granted before 1987. The total value of the death benefit payable on a plan member's death may therefore be less than the value of the member's accrued pension. Some plans provide more generous benefits than the minimum required, but typically they will pay these benefits only to the surviving spouse or children of the plan member.¹¹²

b. Recommendations for Reform

The Commission has developed recommendations with respect to the non-member spouse's entitlement to a share of the death benefits payable on the pre-retirement death of the member spouse, as well as recommendations with respect to the death benefits payable on the pre-retirement death of the non-member spouse.

(1) Pre-Retirement Death of Member Spouse

It is necessary to ensure that the non-member spouse has an entitlement to at least a portion of the death benefits payable on the pre-retirement death of the member spouse, because on the pre-retirement death of the member spouse all rights of the non-member spouse on a deferred benefit split are otherwise extinguished. The provisions of the *Pension Benefits Act*¹¹³ concerning plan-administered "if and when" arrangements are less than adequate in protecting the non-member spouse's interest. The Commission wishes to improve on those provisions by introducing more certainty into the entitlement provisions, as well as by introducing a scheme for priorities among non-member spouses, surviving spouses, dependants, and designated beneficiaries.

Under the Commission's proposals, the non-member spouse will be entitled, on the pre-retirement death of the member, to a fractional interest, as set out in the Notice of Division, of any death benefit payable. The non-member

¹¹⁰ *Ibid.*, s. 48(6), (7), (14).

¹¹¹ *Ibid.*, s. 48(4), and regulations under the *Pension Benefits Act*, *supra*, note 4, s. 43(2).

¹¹² *Mercer Handbook*, *supra*, note 54, at 41-42.

¹¹³ *Supra*, note 2, s. 51.

spouse will be entitled to the return of his or her fractional interest of the death benefit in priority to any surviving spouse, designated beneficiary, or dependant who might otherwise be entitled to a pre-retirement death benefit.¹¹⁴ In many cases, the value of a death benefit and, accordingly, the non-member spouse's share, will be insufficient to satisfy the equalization payment owing. In our view, however, this approach presents the most equitable solution to all potential beneficiaries and is the most straightforward scheme to administer from the plan's point of view.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, on the pre-retirement death of the member spouse, the non-member spouse should be entitled to a share of any death or survivor benefit paid on the life of the member spouse based on the fractional interest of the non-member spouse in the member's pension, as set out in the Notice of Division.

(2) Pre-Retirement Death of Non-Member Spouse

It is also necessary to ensure that, on the pre-retirement death of the non-member spouse, compensation will be paid to the estate of the non-member spouse. The Commission suggests that this be accomplished by requiring the plan administrator, on the pre-retirement death of the non-member spouse, to calculate the commuted value of the member's pension and distribute a share of that commuted value to the estate of the non-member spouse or to a designated beneficiary.¹¹⁵ The calculations of the plan administrator should be based on the

¹¹⁴ The Commission's approach is similar to that found in the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.9(1), as en. by S.B.C. 1994, c. 6, s. 8:

55.9—(1) If a member dies before the limited member receives a share of the pension under section 55.5, the limited member is entitled to a proportionate share of any preretirement survivor benefit payable under the member's pension.

See, also, B.C. Report No. 123, *supra*, note 5, at 86, 92.

This is unlike the recommendations of the Alberta Institute of Law Research and Reform, which provide for the sharing of pre-retirement death benefits unless there is a surviving spouse: Alta. Report No. 48, *supra*, note 20, at 34-35.

¹¹⁵ This approach is taken in the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.9(3), as en. by S.B.C. 1994, c. 6, s. 8:

55.9—(3) If a limited member dies before the member and before receiving a share of the pension under section 55.5, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension.

See, also, B.C. Report No. 123, *supra*, note 5, at 87, where such an approach was recommended.

Transfer Value Recommendations developed by the Canadian Institute of Actuaries¹¹⁶ and prescribed in regulations under the *Pension Benefits Act*. The share to be paid will be based on the fractional interest set out in the Notice of Division, and will be paid in the form of a lump-sum payment to the non-member's estate or to a beneficiary, if such a designation has been filed with the plan administrator. Any amount transferred directly to the non-member's estate will be a cash amount and therefore subject to tax.¹¹⁷

It will be necessary to adjust the member's share after payment of the death benefit in a manner that is fair to the member and to the plan. The Commission suggests that the method adopted in regulations for the adjustment of a member's share after a transfer of the commuted value at the time of marriage breakdown can also be applied when there is a pre-retirement death of a non-member spouse.¹¹⁸

In the Commission's view, the member should be entitled, on the pre-retirement death of the non-member spouse, to make a payment representing the non-member spouse's share of the commuted value of the pension to the plan administrator to be paid to the non-member spouse's estate to avoid a dilution of his or her pension interest. This will allow the member the option of, in effect, buying back the pension entitlement on the non-member spouse's death.¹¹⁹

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, on the pre-retirement death of the non-member spouse,

- (a) the plan administrator should pay a death benefit on the life of non-member spouse consisting of a fractional interest, as set out in the Notice of Division, of the commuted value of the member's pension calculated in accordance with the Canadian Institute of Actuaries' *Recommendations for the Computation of Transfer Values from*

This was also the recommendation of the Alberta Institute of Law Research and Reform in Report No. 48, *supra*, note 20, Recommendation No. 16, at 36:

We recommend that an order for the division of proceeds of a pension benefit shall not be affected by the death of the non-employee spouse and that the proceeds shall be payable to the estate or to the beneficiaries of the non-employee spouse.

¹¹⁶ *Supra*, note 30.

¹¹⁷ See *Mercer Handbook*, *supra*, note 54, at 41.

¹¹⁸ See discussion *supra*, this ch., sec. 3(c), "Adjustment of Member's Pension after Transfer".

¹¹⁹ This suggestion was made by Tom Anderson, Commissioner at the Law Reform Commission of British Columbia, in a memorandum (December 2, 1992), at 5.

Registered Pension Plans as of the date of the non-member spouse's death;

- (b) the non-member spouse should be entitled to designate a beneficiary to receive the pre-retirement death benefit, but if no designation is made, the death benefit be payable to the estate of the non-member spouse;
- (c) the member's pension should be adjusted in a manner prescribed by regulation after payment of the death benefit on the life of the non-member spouse; and
- (d) the member spouse should have the option of paying the death benefit directly to the estate of the non-member spouse or the beneficiary designated by non-member spouse, thereby avoiding the dilution of his or her pension interest.

(viii) Post-Retirement Death Benefits

a. Current Law in Ontario

The Commission has already considered whether the non-member spouse's pension interest, and, therefore, payments from the plan, should be extinguished at the time of the post-retirement death of the member.¹²⁰ Under the Commission's proposals, the post-retirement death of the member will have no effect on the interest of the non-member spouse because, at the time of retirement, the non-member spouse will receive his or her own separate pension payable for life. The issue that remains is whether the non-member spouse should have a post-retirement death benefit attached to his or her pension interest. Post-retirement death benefits can take two forms: the joint-and-survivor pension mandated by the *Pension Benefits Act*, and death benefits voluntarily provided for by the plan sponsor under the terms of the pension plan.

The *Pension Benefits Act*¹²¹ states that all pensions must provide for a joint-and-survivor pension where spouses are cohabiting at the time of marriage breakdown. The joint-and-survivor form, which was discussed earlier in this chapter, provides for reduced benefits to the member during his or her life, with a pension continuing to his or her spouse during the spouse's life. Many pension plans also voluntarily provide for death benefits under the normal form of the pension. For example, the plan may guarantee payment of death benefits for a fixed period, regardless of when the member dies. Thus in the case of a five-year

¹²⁰ See *supra*, this ch., sec. 4(b)(iii) "Division of Member's Pension".

¹²¹ *Supra*, note 2, s. 44.

guaranteed annuity, if a member dies one year after retirement, the benefits continue to the individual's estate or to a designated beneficiary for the remaining four years.

In addition to death benefits provided for in the normal form, members are entitled to elect any other death benefit available under the pension plan. For example, members may elect a longer guarantee period where they receive lower monthly payments. Normally, options are provided on an actuarial-equivalent basis, so there is no cost to the plan. In other cases, the guarantee period may be equal to the total of employee contributions plus interest at the date of retirement, divided by the monthly pension benefit. This form of guaranteed term ensures that the beneficiary of the death benefits or the member's estate receives a death benefit consisting of the member's contributions with interest, reduced by the benefits already received.¹²²

b. Recommendations for Reform

In the Commission's view, it would be appropriate to provide post-retirement death benefits on the life of the non-member spouse that would be similar to those available to the member spouse, with the exception of the joint-and-survivor pension. The joint-and-survivor pension option should not be available to the non-member spouse because it would require the plan to pay out benefits to a class of individuals not originally anticipated by the plan.¹²³ Where death benefits, other than a joint-and-survivor option, are available under the terms of the pension plan, either in the normal form or by way of election, they should also be available to the non-member spouse. Death benefits are relatively straightforward to administer, and offer some security to the non-member spouse, in that his or her beneficiaries will be provided for in the event of his or her death. The non-member spouse should have the option of designating a beneficiary of these death benefits and, in the absence of a designation, the death benefits should be paid to the non-member spouse's estate. The non-member spouse should not be entitled to any share of the death benefits paid on the life of

¹²² *Canadian Employment Benefits and Pension Guide Reports* (North York, Ont.: CCH, looseleaf), Vol. I, ¶¶2361, 2357, at 2105.

¹²³ The possibility of the non-member spouse electing for a joint-and-survivor benefit was also rejected by the Law Reform Commission of British Columbia: Report No. 123, *supra*, note 5, Regulation 3 of the proposed legislation, at 97. Under the British Columbia proposals, the non-member spouse is required to take a "single life pension plan". In this form, the pension is payable for the lifetime of the non-member spouse, with no further benefit after death.

the member unless the member agrees to designate the non-member spouse as a beneficiary.¹²⁴

The Commission's proposals do not interfere with the types of post-retirement death benefits available on the member's life.¹²⁵ For example, if the member is living with a spouse at the date of pension commencement, then the member's pension will be payable in a joint-and-survivor form, unless a waiver has been filed with the plan administrator.¹²⁶ The member will be entitled to make any elections concerning the form of the pension that would otherwise be available. The member will not have any right in the death benefit payable on the non-member spouse's life unless the non-member spouse agrees to designate him or her as a beneficiary. The non-member spouse will have no statutory right to a joint-and-survivor pension payable on the member's death, because deferred benefit splits are only available where pension division occurs prior to pension commencement, and joint-and-survivor pensions are only available where the parties are living together at the time the pension payments commence.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, the pension of the non-member spouse should include death benefits (other than the joint-and-survivor benefit) payable on his or her life under the terms of the pension plan.

(ix) Right of Non-Member Spouse to Disclosure on Deferred Benefit Split

a. Current Law in Ontario

One important element of the Commission's proposals for deferred benefit splits concerns disclosure by the plan to the non-member spouse. The only circumstances where the *Pension Benefits Act*¹²⁷ requires plan administrators to

¹²⁴ See *Family Relations Act* (B.C.), *supra*, note 5, s. 55.9, as en. by S.B.C. 1994, c. 6, s. 8:

55.9—(2) If a member dies after the limited member receives a share of the pension under section 55.5, the limited member is entitled to no further share of the member's pension except to the extent that the member has designated the limited member to be a beneficiary of the pension.

See, also, B.C. Report No. 123, *supra*, note 5, at 86.

¹²⁵ The value of the death benefit payable on the member's life will be based on the member's share of the pension after the benefit split, and not on the value of the total pension prior to the division.

¹²⁶ *Pension Benefits Act*, *supra*, note 2, ss. 44, 46.

¹²⁷ *Supra*, note 2, s. 51.

provide disclosure to non-member spouses for the purposes of plan-administrated "if and when" arrangements is on termination of the member's employment.¹²⁸ Regulations to the *Pension Benefits Act*¹²⁹ place a duty on the plan administrator to notify the non-member spouse of the member's termination of employment, to send a copy of the termination statement to the member, and to advise the non-member spouse of the options available on termination of the member's employment.

Apart from the situation where the member terminates employment, the disclosure obligations of a plan administrator to a non-member spouse, on a plan-administered "if and when" arrangement, are limited to the general disclosure provisions of the *Pension Benefits Act*. General provisions that may be applicable to a non-member spouse include those requiring a plan administrator to provide any authorized person with an opportunity to view documents within thirty days of receiving a written request.¹³⁰ Documents include annual information returns, cost certificates, wind-up reports, and documents associated with fund investment agreements, trust arrangements, and membership in the plan. Authorized persons include members, former members, spouses of members and former members, legal representatives, union representatives, and persons entitled to benefits under the plan.¹³¹ The information must be provided free of charge. A request can be made only once in a calendar year. While the parties are still married, a non-member spouse may be considered a "person entitled to pension benefits under the pension plan".¹³²

Another option for a non-member spouse seeking disclosure arises from the provisions of the *Pension Benefits Act* that allow any person to inspect plan documentation at the office of the Pension Commission of Ontario during regular business hours.¹³³ However, this does not include information specific to the individual member's plan.

While the obligations of a plan administrator to make disclosure to non-member spouses are limited, extensive provisions exist in the *Pension Benefits Act* regarding disclosure to members. For example, all members and prospective members are entitled to an explanation of the applicable provisions of the plan, a

¹²⁸ *Ibid.*, s. 51(5).

¹²⁹ *Supra*, note 4, s. 46.

¹³⁰ *Pension Benefits Act*, *supra*, note 2, ss. 29, 30, and regulations, *supra*, note 4, s. 45(1), (5), as am. by O. Reg. 712/92, s. 24.

¹³¹ *Pension Benefits Act*, *supra*, note 2, s. 29(1).

¹³² *Ibid.*, s. 29(1).

¹³³ *Ibid.*, s. 30.

description of the member's rights and obligations under the plan, and any other information prescribed by regulation.¹³⁴ The plan administrator is also required to provide the member with an annual benefit statement within six months after the fiscal year end of the plan.¹³⁵ The annual benefit statement must show the member's and the employer's accumulated contributions (for defined contribution plans), and the member's accrued pension (for defined benefit plans);¹³⁶ details of any payments being made to liquidate a liability, in a continuing plan and on wind-up;¹³⁷ the name of the member's designated beneficiary for the purposes of the pre-retirement death benefit;¹³⁸ and a description of any benefits provided on the death of a member other than mandated pre-retirement and post-retirement death benefits.¹³⁹

The plan administrator must also provide the member with a termination statement within thirty days of the member's date of termination of employment or cessation of membership in the plan, or within thirty days of the plan administrator receiving notification of the termination. The termination statement must contain prescribed information, including information about the pension benefits and ancillary benefits that the member is entitled to receive on termination.¹⁴⁰

At least sixty days prior to a member's intended date of retirement, the plan administrator must provide the member with a statement of options respecting payment of the pension available under the plan, the Act, or the regulations, and the time period in which the options may be exercised.¹⁴¹ It must also furnish a retired member with a written statement of retirement benefits within thirty days of the member's retirement, or within thirty days after the administrator receives

¹³⁴ *Ibid.*, s. 25(1).

¹³⁵ *Ibid.*, s. 27, and regulations under *Pension Benefits Act*, *supra*, note 4, s. 40(2). The information required on this annual benefit statement includes the following basic employee data: member's name; member's date of birth; date of plan entry; date of hire (all plans except multi-employer plans); member's normal retirement date; earliest date member is eligible to receive an unreduced pension (where applicable); name of spouse (where applicable); and years of employment used to calculate pension benefits as of the end of statement period (defined benefit plan): see regulations, *ibid.*, s. 40(1)(b), (d), (f), (g), (h), (p)(i).

¹³⁶ Regulations under the *Pension Benefits Act*, *ibid.*, s. 40(1)(k), (l), (m), (n), (o), (p)(ii).

¹³⁷ *Ibid.*, s. 40(1)(q), (r), as am. by O.Reg. 629/92, s. 7.

¹³⁸ *Ibid.*, s. 40(1)(i).

¹³⁹ *Ibid.*, s. 40(1)(j).

¹⁴⁰ *Pension Benefits Act*, *supra*, note 2, s. 28(1), and regulations, *supra*, note 4, ss. 41, 42.

¹⁴¹ *Pension Benefits Act*, *supra*, note 2, s. 28(1), and regulations, *supra*, note 4, s. 44(1), (2).

notification of retirement by the member.¹⁴² Within thirty days of being notified of the death of a member, the plan administrator is required to provide a statement of death benefits to the member's surviving spouse, beneficiary, or legal representative.¹⁴³

The plan administrator must also notify members and former members of new amendments that would adversely affect members' and former members' rights and benefits. This notice must explain the proposed changes and invite comments to be submitted to the Superintendent of Pensions.¹⁴⁴

b. Current Law in Other Canadian Jurisdictions

The Ontario legislation providing for disclosure to non-member spouses on a pension division at source is unusually restrictive when compared to that of other Canadian jurisdictions. Most legislation providing for benefit splits as a means of settling family property on marriage breakdown requires that broader disclosure be made to the non-member spouse. For example, under the federal *Pension Benefits Standards Act, 1985*,¹⁴⁵ non-member spouses are entitled to the same information as members in the event of a benefit split. Members and spouses have the same rights to an explanation of the provisions of the plan and to an annual information statement, and they may also inspect documents annually. In addition, on the death of a member, the spouse is entitled to certain statements from the plan regarding death benefits.

Under Prince Edward Island's *Pension Benefits Act*,¹⁴⁶ the plan administrator is required to provide "prescribed information to the spouse" where the pension is divided at source.

The Quebec *Supplemental Pension Plans Act*¹⁴⁷ provides that, on an application for the partition of a pension benefit, the non-member spouse is entitled to certain information from the plan, including the text of the pension plan and any other documents prescribed in the regulations. The non-member

¹⁴² *Pension Benefits Act*, *supra*, note 2, s. 28(1), and regulations, *supra*, note 4, s. 44(3), (4).

¹⁴³ Regulations under the *Pension Benefits Act*, *ibid.*, s. 43.

¹⁴⁴ *Pension Benefits Act*, *supra*, note 2, s. 26(1).

¹⁴⁵ *Supra*, note 51, ss. 25(4), 28.

¹⁴⁶ S.P.E.I. 1990, c. 41, s. 60(4)(g) (not yet proclaimed).

¹⁴⁷ R.S.Q., c. R-15.1

spouse is also entitled to a statement of benefits accumulated by the member and the value thereof.¹⁴⁸

The Nova Scotia *Pension Benefits Act*¹⁴⁹ also requires that the plan administrator supply "prescribed information" to a spouse on pension division at source. The regulations provide that where an order has been filed under section 61 of the Act respecting pension division at source and the member terminates employment, the plan administrator is required to notify the person named in the order of termination and advise the person of options available on termination.¹⁵⁰

The Saskatchewan *Pension Benefits Act, 1992*,¹⁵¹ requires that the plan administrator provide prescribed information to a spouse where the pension is being divided at source. Regulations to the *Pension Benefits Act, 1992*¹⁵² provide details of what must be disclosed to the non-member spouse on pension division at source. On marriage breakdown, the spouse of a member or former member, or the spouse's solicitor, is entitled to receive information concerning the value of the member's or former member's benefits. Where information is provided to the spouse or his or her solicitor, the administrator must notify the member or former member. After a division, the administrator must provide an accounting to all parties with respect to the distribution of funds or recalculation of benefits, as the case may be.¹⁵³

The British Columbia *Family Relations Act*¹⁵⁴ provides for two kinds of disclosure to a non-member spouse. The legislation states that a non-member spouse is entitled to receive, at the time of marriage breakdown and on an annual

¹⁴⁸ *Ibid.*, s. 108.

¹⁴⁹ R.S.N.S. 1989, c. 340, s. 61(4)(h).

¹⁵⁰ Regulations under the *Pension Benefits Act*, N.S. Reg. 269/87, s. 37.

¹⁵¹ S.S. 1992, c. P-6.001, s. 13(1)(f).

¹⁵² The Pension Benefits Regulations, 1993, Sask. Reg. 1, s. 18.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra*, note 5.

basis, "prescribed information in respect of the plan".¹⁵⁵ In addition, the court may order that a plan administrator provide information at any time.¹⁵⁶

c. Recommendations for Reform

As has been noted, extensive disclosure requirements in favour of members are imposed in Ontario by *Pension Benefits Act*. These requirements, while seemingly onerous, have nevertheless been deemed necessary by legislators to keep members adequately informed. In addition, other provinces have required extensive disclosure on pension division at source. The Commission has concluded, therefore, that the current provisions of the *Pension Benefits Act* do not provide for adequate disclosure to non-member spouses. Where pensions are divided at source, given the complex nature of pensions and pension entitlements, non-member spouses require more disclosure than is currently available if they are to effectively exercise their rights on a benefit split.

In determining the most appropriate method of ensuring that non-member spouses receive adequate information, the Commission considered a number of alternatives. One possibility would be to treat non-member spouses in the same fashion as former members for disclosure purposes (that is, in the same fashion as members who, on termination, opt for a deferred pension under section 37 of the *Pension Benefits Act*). However, given that the interest of a non-member spouse in the retirement value of a pension would continue to accrue until retirement, whereas the interest of a former member would, for the most part, be frozen on termination, the Commission concluded that this would not be an appropriate approach. Another possibility would be to oblige the plan administrator to make disclosure to the non-member spouse on a request basis. The Commission declined to recommend this option because merely providing non-member spouses with the right to request certain types of information would not assist the unsophisticated non-member spouse who might not be aware of the benefits of making such a request.

Having examined the alternatives, the Commission has settled on the following proposals to ensure that non-member spouses receive adequate

¹⁵⁵ *Ibid.*, s. 55.94(1), as en. by S.B.C. 1994, c. 6, s. 8. See, also, B.C. Report No. 123, *supra*, note 5, at 91. Under the Law Reform Commission of British Columbia's proposals, the information that the non-member spouse can request is limited to "any information necessary to value the interest of a member in the pension, including information on options available to, and elections that may be made by, the member with respect to the pension" and "any information or notice available to members of the plan". The non-member spouse is also entitled, under the British Columbia proposals, to "30 days prior notice of any transaction relating to the member's interest in the plan" by reason of the member's death, retirement, or direction to the plan: *ibid*, Regulation 12 of the proposed legislation, at 105.

¹⁵⁶ *Family Relations Act* (B.C.), *supra*, note 5, s. 55.94(2), as en. by S.B.C. 1994, c. 6, s. 8.

disclosure on a deferred benefit split. Under the Commission's proposals, the plan administrator will be required to ensure that all information and correspondence sent to the member is copied and sent to the non-member spouse. This will include all correspondence sent to the plan by the member and *vice versa*. The plan administrator will also be required to send individualized information to the non-member spouse in specific circumstances. For example, where the member terminates employment (either voluntarily or involuntarily), where the member dies during the pre-retirement period, or where the plan winds up prior to the pension commencement date, the non-member spouse will be entitled to information from the plan administrator respecting his or her specific options and rights.

These recommendations will apply prior to the pension commencement date on a deferred benefit split. Once the non-member spouse begins receiving benefits directly from the plan, the non-member spouse will be treated as a member for disclosure purposes, communicating with the plan respecting his or her own entitlement as if he or she were a member. The non-member spouse will no longer be kept informed regarding the member's pension, and the member will have no right to information regarding the non-member spouse's pension. At the time of pension commencement on a deferred benefit split, the plan administrator will also be required to provide both the member and the non-member spouse with an accounting concerning the adjustment and recalculation of the member's pension.

The Commission appreciates that an additional administrative burden will be imposed on plans as a result of our recommendations. Nonetheless, access to information is essential to the non-member spouse's ability to realize his or her interest in the member's pension. The Commission has attempted to reduce the costs imposed by the disclosure requirements by requiring that, in the normal course of events, copies of documents be sent to the non-member spouse, rather than individualized statements or documents. To further reduce the costs to the plan, a duty should be placed on the non-member spouse to keep the plan administrator informed of his or her current address and, in the event of a failure to do so, the plan should be discharged from its duty to provide the non-member spouse with further information.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, prior to the commencement of pension payments to the non-member spouse,

- (a) the plan administrator should provide the non-member spouse with copies of all information, correspondence, and documentation sent to the member spouse; and

- (b) the non-member spouse should be entitled to individualized information from the pension plan in the event of the member's pre-retirement death on the member's retirement, on termination of employment by the member, and on a plan wind-up.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, after commencement of pension payments to the non-member spouse,

- (a) the non-member spouse should be treated as a member of the plan for information, disclosure and reporting purposes; and
- (b) the non-member spouse should no longer be entitled to information regarding the member's pension.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on a deferred benefit split, after payment of the pension commences, the plan administrator should provide an accounting to both the member spouse and non-member spouse with respect to the recalculation of benefits.

(c) IMMEDIATE BENEFIT SPLITS

(i) Introduction

A second type of benefit split available under the Commission's proposals is termed an "immediate benefit split". Where spouses separate (or settle their property) after a pension is in pay, they will be entitled to an immediate benefit split.¹⁵⁷ In developing proposals for an immediate benefit split, two approaches

¹⁵⁷ For a similar approach, see the *Family Relations Act* (B.C.), *supra*, note 5, s. 55.7, as en. by S.B.C. 1994, c. 6, s. 8:

55.7—(1) If the pension to be divided is in a local plan and has matured, a spouse, by delivering a notice in the prescribed form under section 55.3(1), is entitled to receive from the plan a proportionate share of benefits paid under the pension until

- (a) the death of the spouse, or
- (b) the termination of the pension,

whichever occurs first.

(2) Despite subsection (1), a spouse who is a designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.

were considered by the Commission. The first approach was to divide the income stream as a means of dividing the pension. This is the current method for division under section 51 of the *Pension Benefits Act*.¹⁵⁸ Under section 51, the plan administrator is required to pay out a portion of the payment to the non-member spouse, with the appropriate deductions for tax. On the member spouse's death, the pension payments to the non-member spouse cease.

The Commission decided against this approach because, where the non-member spouse is not entitled to a joint-and-survivor pension, the non-member spouse has no right to payments from the pension plan after the member's death. In addition, where marriage breakdown occurs before the commencement of the

(3) A local plan that pays a proportionate share of benefits to a spouse must make separate source deductions with respect to deductions required under the *Income Tax Act* (Canada) for the spouse's share and the member's share of the benefits.

(4) Despite section 55.2(2), a spouse who, before this Part came into force, is entitled to receive from a member payment of a proportionate share of benefits paid under a matured pension, may, by delivering a notice in the prescribed form to the administrator, require the plan to administer the division in accordance with this section.

See, also, B.C. Report No. 123, *supra*, note 5, at 87-88. Under the British Columbia recommendations, a benefit split of a matured pension is accomplished by splitting the member's pension payments until the member's death, at which time payments to the non-member spouse cease. The Law Reform Commission of British Columbia hoped that the joint-and-survivor pension would replace these payments on the death of the member, or that the non-member spouse would be provided for by life insurance.

The recommendations of the Ontario Law Reform Commission differ from those of the Alberta Institute of Law Research and Reform, in Report No. 48, *supra*, note 18, at 40, where pension division at source was not recommended for matured pensions for the following reasons:

3.66 A valuation and division would be appropriate only at a time when the employee spouse's benefit is vested. It could not be used after the pension has commenced, because the commencement of the pension crystallizes the rights of the pension plan, the employee spouse, and (sometimes) of the provider of an annuity which is purchased for the employee spouse from the pension fund.

However, the Alberta Institute did make a proposal similar to British Columbia's, namely a "division of proceeds" by the plan: *ibid.*, Recommendation Nos. 18 and 19, at 41.

This is also the approach under the *Pension Benefits Act*, 1992 (Sask.), *supra*, note 151, s. 47(2), (4), (6). Where the pension division concerns a pension in pay, the non-member spouse is entitled to a share of the pension payment until the member dies. Thereafter, the member receives his or her entitlement under the joint-and-survivor pension, if the non-member spouse met the definition of "spouse" under the Act at the date of retirement and if no waiver of the benefit was filed at retirement.

The Pension Benefits Act (Man.), R.S.M. 1987, c. P32 (also C.C.S.M., c. P32), s. 31(4), contains provisions similar to those in Saskatchewan.

¹⁵⁸ *Supra*, note 2.

pension, but the family property is not settled until after the actual retirement of the member spouse, a joint-and-survivor pension is not available to the non-member spouse because the spouses are living separate and apart at the date of pension commencement.¹⁵⁹

The second possibility considered by the Commission for dividing a matured pension was the creation of two separate annuities or pensions.¹⁶⁰ Under this option, the pension is revalued or actuarially converted at the time of settlement.¹⁶¹ The two separate pensions are then paid based on the individual life expectancies of the member and the non-member spouse. The Commission favours the separate pensions option because it ensures payment to the non-member spouses for the duration of his or her life.

The pension interests of the member spouse will be adjusted to ensure that the division is fair. So as not to impose an additional funding obligation on the plan, the two shares will be the actuarial equivalent of the member's pension. A method for adjusting the two annuities or pensions on an immediate benefit split should be developed in regulations. Again, it would be very desirable to draw on the expertise of the Canadian Institute of Actuaries in establishing the adjustment method.¹⁶² The immediate benefit split should be made in a way that is cost-neutral to the plan and that requires the member to give up no more in benefits than is necessary to effect an equitable division.

The Commission believes that a non-member spouse should not be entitled to retain an interest in a joint-and-survivor pension after a benefit split. Under the Commission's proposals, an immediate benefit split to settle an equalization entitlement will result in the elimination of any joint-and-survivor benefit that might have otherwise been payable to the non-member spouse. A joint-and-

¹⁵⁹ *Ibid*, s. 44(4)(b).

¹⁶⁰ The federal *Pension Benefits Standards Act, 1985*, *supra*, note 51, s. 25(7), provides for a similar procedure where an assignment of a pension benefit in pay occurs. The Act provides for an actuarial conversion of a pension in pay if the plan allows it: E. Diane Pask and Cheryl A. Hass, "Division of Pensions: The Impact of Family Law on Pensions and Pension Plan Administrators" (1993), 9 Can. Fam. L.Q. 133, at 156.

¹⁶¹ This will be the projected settlement date set out in the Notice of Intention and not the date on which the Notice of Intention is filed: see discussion *supra*, this ch., sec. 2(a)(i) "Notice of Intention to Divide Pension at Source".

¹⁶² One possible approach would be to take, for example, a \$1,000 monthly benefit, apply a fractional interest of one-half to the non-member spouse's benefit, and pay the \$500 share to the non-member spouse over his or her life. The value of the pension benefit would be the actuarial equivalent of the pension share, but the monthly amount would be based on the ages and life expectancies of the parties. If the non-member spouse were younger than the member, the monthly payments might be actuarially valued at \$350. This form of adjustment would ensure that the member retains one-half of the pension value.

survivor pension would be payable to the non-member spouse on the member's death if the spouses were cohabiting at the time of pension commencement. In some cases, this may result in the non-member spouse being entitled to a lesser benefit. The Commission considered conferring on the non-member spouse the ability to elect either a division of pension payments until the death of the member and thereafter a joint-and-survivor pension, or an actuarial recalculation at the time of settlement and the creation of two separate annuities. The Commission decided against the election option because of its administrative complexity.

Two issues arise with respect to the recalculation of pensions in pay. The first is that a recalculation of a pension in pay may lead to anti-selection factors that can create funding problems for the plan. Anti-selection factors arise when a member has knowledge that will affect his or her pension entitlement, for example, if a member is in poor health and makes a decision concerning pension plan benefits based on that knowledge. Anti-selection may also arise where a member withholds or misrepresents information that will affect his or her pension entitlement.¹⁶³ Any anti-selection factors that can arise in the division of a matured pension and that may have a negative impact on plan funding should be addressed in regulations. Where anti-selection factors become a concern, more rigid requirements should be imposed to ensure that those factors are controlled (for example, by the member supplying a certificate of good health).

The second issue concerns the application of the Commission's proposals to matured plans where annuities have been purchased by the plans from insurance companies. Under the Commission's proposals, where pension benefits are financed by purchasing a life annuity for the member or for a group of members from an insurance company, insurance companies will be required to revalue the pension and provide a separate pension to the non-member spouse. To accomplish this, annuity contracts will require provisions allowing for an immediate benefit split where a marriage breakdown occurs after retirement. If this imposes a funding cost, then the insurance company can build in a margin for this cost in pricing its annuities.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an immediate benefit split, the plan administrator should be required to

- (a) obtain a recalculation of the member's pension as of a projected settlement date as set out in the Notice of Intention;

¹⁶³ Kenneth Black, Jr. and Harold D. Skipper, Jr. (eds.), *Life Insurance*, 12th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1994).

- (b) determine the non-member's share by applying the fractional interest, as set out in the Notice of Division, to the recalculated value;
- (c) transfer the non-member's share of the member's pension to a separate account in the pension plan in the name of the non-member spouse;
- (d) provide a separate pension to the non-member spouse based on the normal form under the pension plan unless the normal form is a joint-and-survivor form;
- (e) pay to the non-member spouse a monthly pension benefit actuarially valued over the life of the non-member spouse;
- (f) readjust the member's pension in a manner provided for in regulations; and
- (g) provide an accounting to both the member spouse and the non-member spouse with respect to the recalculation of benefits.

The Commission recommends that the proposed pension division-at-source legislation should provide that annuities purchased by the plan administrator on the member's retirement and held by a third party insurance company be subject to division.

(ii) Rights of Non-Member Spouse

On an immediate benefit split, a non-member spouse will have the same rights as a member under the pension plan. For example, the non-member spouse will have the right to receive payments from the plan for life, with the appropriate deductions for taxes. The non-member spouse will also have the same right to information and notice as a member, tailored to the non-member spouse's pension interest. In the case of a plan wind-up after the member's retirement, the non-member spouse will have the same elections with respect to his or her share of the pension as a member.¹⁶⁴ The non-member spouse will be entitled to benefit from post-retirement plan improvements and benefit escalation resulting from indexing or any other cause.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an immediate benefit split, the non-member spouse should have the rights of a member under the *Pension Benefits Act*, except to the extent modified by the Commission's recommendations.

¹⁶⁴ See *Pension Benefits Act*, *supra*, note 2, ss. 68-77.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an immediate benefit split, the member spouse should retain all rights under the pension plan with respect to his or her remaining share of the pension.

(iii) Death Benefits

An important issue on an immediate pension split is whether death benefits available under the normal form of the pension plan should be available to the non-member spouse. In the Commission's view, the non-member spouse should be entitled to receive death benefits (with the exception of the joint-and-survivor form) available under the normal form of the pension and to make any elections regarding death benefits available under the terms of the pension plan. For example, if under the normal form of the plan a member has the option of a death benefit consisting of a return of contributions plus interest, then that should be available to the estate of the non-member spouse. The joint-and-survivor form should not be available to the non-member spouse, because it would place an unjustifiable administrative burden on the pension plan. Plans should not be required to provide pensions to the spouse of a former spouse.

Member spouses, on an immediate benefit split, should be entitled to the same types of death benefits, joint-and-survivor options, or elections that they would have otherwise been entitled to.¹⁶⁵ For example, the joint-and-survivor option will continue to be available to the member where it is not otherwise proscribed by the legislation. The joint-and-survivor option will be available where marriage breakdown occurs prior to the pension coming into pay, but the family property is not settled until after the pension payments commence, and the member is living with a subsequent spouse at the time of pension commencement.¹⁶⁶

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an immediate benefit split, the pension of the non-member spouse should include death benefits (other than the joint-and-survivor benefit) payable on his or her life under the terms of the pension plan.

The Commission recommends that the proposed pension division-at-source legislation should provide that, on an immediate benefit split, entitlement of the non-member spouse to a joint-and-survivor pension that arose prior to the immediate benefit split by virtue of the operation of section 48 of the *Pension Benefits Act* should be extinguished.

¹⁶⁵ The death benefit available to the member will be based on the value of the member's share of the pension after a benefit split and not on the total retirement value of the pension.

¹⁶⁶ *Pension Benefits Act*, *supra*, note 2, s. 44.

CHAPTER 8

DIVISION OF CANADA PENSION PLAN CREDITS

1. INTRODUCTION

On January 1, 1987, the *Canada Pension Plan*¹ (the *CPP Act*) was amended to provide for mandatory division of pension credits or benefits between spouses on marriage breakdown. There has been some confusion and uncertainty concerning the splitting of CPP entitlements, particularly with respect to whether a spouse may waive entitlement to a share in the other spouse's CPP benefits. Although the plan itself does not provide for waiver, the legislation does permit provinces to enact legislation enabling spouses to agree that they will not divide CPP entitlements. No legislation on this point has been enacted in Ontario.²

The issue considered by the Commission in this chapter is whether CPP credits should be split on a mandatory basis in the manner provided for in the *CPP Act*, or whether the spouses should be permitted by provincial legislation to agree to waive their entitlement to a credit split. In our deliberations on this issue, the Commission has derived assistance from two recent law reform commission reports from Alberta and British Columbia.

In its detailed Report No. 58,³ the Alberta Law Reform Institute (the Alberta Institute) considered the choices for action on the division of CPP credits and benefits. That report was referred to by the Law Reform Commission of British Columbia (the British Columbia Commission) when it addressed the CPP

¹ R.S.C. 1985, c. C-8, as am. by R.S.C. 1985, c. 30 (2nd Supp.).

² It must be considered whether the general provisions of the *Family Law Act*, R.S.O. 1990, c. F.3, permitting spouses to enter into domestic contracts, would constitute enabling legislation of the requisite kind. A careful reading of s. 55.2(3) of the *CPP Act*, *supra*, note 1, as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23, suggests that these *Family Law Act* provisions do not satisfy the requirements of the *CPP Act*. It appears that, to enable parties to contract out of the division of pension credits, the *Family Law Act* would have to contain an express reference to the *CPP Act*: see s. 55.2(3)(a). This seems to be the conclusion of the Ontario Court (General Division) in *Albrecht v. Albrecht* (1990), 31 R.F.L. (3d) 325 (Ont. Div. Ct.), rev'g (1989), 23 R.F.L. (3d) 8 (Ont. Dist. Ct.).

³ Alberta Law Reform Institute, *Division of Canada Pension Plan Credits in Alberta* (Report No. 58) (Edmonton: November 1990) (hereinafter referred to as "Alta. Report No. 58").

division issue in its Working Paper No. 65⁴ and Report No. 123.⁵ These studies provide a detailed background and analysis of the issues and options. They also indicate that reasonable opinion on the central issue may differ. As will be seen, the British Columbia report recommended provincial enabling legislation; the Alberta report recommended against such a measure.

2. OPTING OUT OF CANADA PENSION PLAN

(a) INTRODUCTION

The *CPP Act* creates a contributory plan funded by the mandatory contributions of employers, employees, and the self-employed, as well as by the earnings generated by the investment of the funds in the plan.⁶ A contributor to the CPP acquires certain entitlements, such as disability and retirement benefits; his or her spouse may also be eligible to receive those benefits.

In the case of marriage breakdown, the *CPP Act* provides for an equal division of the pension credits accumulated by both spouses during the marriage.⁷ Once properly notified that a marriage has been dissolved by divorce or annulment, the Minister must divide equally the pension credits accumulated by both spouses while they were married and living together.⁸ Spouses may also apply for such a division after they have been separated for more than one year.⁹

⁴ Law Reform Commission of British Columbia, *Working Paper on Division of Pensions on Marriage Breakdown* (Working Paper No. 65) (Vancouver: Ministry of Attorney General, December 1990) (hereinafter referred to as "B.C. Working Paper No. 65").

⁵ Law Reform Commission of British Columbia, *Report on the Division of Pensions on Marriage Breakdown* (Report No. 123) (Vancouver: Ministry of Attorney General, January 1992) (hereinafter referred to as "B.C. Report No. 123"). The proposed legislation set out in B.C. Report No. 123 is reproduced *infra*, Appendix D.

⁶ E. Diane Pask and Cheryl A. Hass, *Division of Pensions* (Calgary: Carswell, looseleaf), at XI-1.

⁷ *CPP Act*, *supra*, note 1, s. 55, as am. by R.S.C. 1985, c. 30 (2nd Supp.), s. 22; S.C. 1991, c. 44, s. 6, and s. 55.1, as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23; am. by S.C. 1991, c. 44, s. 7.

⁸ *Ibid.*, s. 55.1(1)(a), as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23; am. by S.C. 1991, c. 44, s. 7.

⁹ *Ibid.*, s. 55.1(1)(b), as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23; am. by S.C. 1991, c. 44, s. 7.

The Act also provides for division of credits between qualifying common-law spouses.¹⁰

The CPP credit-splitting provisions respond to two concerns: first, the recognition that a homemaker makes an important contribution to the well-being of the family and should be compensated equally at retirement, and, second, the fact that income security is as important for non-contributors as it is for contributors.¹¹

As we have indicated, while spouses are not permitted to contract out of the right to apply for a division of credits, the *CPP Act* does allow each province to enact legislation to permit spouses to agree that their CPP credits will not be divided in accordance with the mandatory provisions of the Act. The Act provides that the Minister shall not divide the pension credits:¹²

- (1) where the spousal agreement contains a provision that expressly mentions the *CPP Act* and indicates that there will be no division of the unadjusted pensionable earnings under section 55 or 55.1;
- (2) where that provision of the spousal agreement is expressly permitted under the provincial law that governs spousal agreements; and
- (3) where the spousal agreement has not been invalidated by court order.

(b) CURRENT LAW AND PROPOSALS FOR REFORM IN OTHER CANADIAN JURISDICTIONS

The Saskatchewan *Matrimonial Property Act*¹³ includes a provision expressly referring to the *CPP Act* and permitting spouses to agree not to divide the pension credits in accordance with the *CPP Act*. British Columbia has also recently introduced legislation providing for parties on a marriage breakdown to enter into an agreement to opt out.¹⁴ Legislation of this kind was recommended

¹⁰ *Ibid.*, s. 55.1(1)(c), as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23; am. by S.C. 1991, c. 44, s. 7; s. 2(1) "spouse" as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 1(3).

¹¹ Alta. Report No. 58, *supra*, note 3, at 8-9; see *ibid.*, at 8-10 for a more detailed discussion of the policy considerations.

¹² *CPP Act*, *supra*, note 1, s. 55.2(2), (3), as en. by R.S.C. 1985, c. 30 (2nd Supp.), s. 23.

¹³ S.S. 1979, c. M-6.1, s. 38(4.1), as en. by S.S. 1988-89, c. 12, s. 2.

¹⁴ *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 55.92(1)(c), as en. by the *Family Relations Amendment Act*, S.B.C. 1994, c. 6, s. 8, reproduced *infra*, Appendix E. These amendments are to come into force by regulation of the Lieutenant Governor-in-Council.

by the Law Reform Commission of British Columbia (the British Columbia) in its *Report on the Division of Pensions on Marriage Breakdown*.¹⁵

The British Columbia Commission placed considerable weight on the general principles of contract law governing the enforcement of agreements and the circumstances under which courts may set aside a contract or modify its application.¹⁶ The first principle favouring the right of spouses to enter into binding agreements is based on freedom of contract. Other principles referred to relate to situations where courts are unwilling to enforce bargains for a variety of reasons. Where an agreement has been unfairly or improperly obtained, for example, general principles of contract law offer defences to make the improvident agreement unenforceable. Given that the division of employment pension rights and other property may be determined by a spousal agreement, the British Columbia Commission considered that it would be unreasonable to impose a blanket prohibition against contracting out of entitlement to CPP benefits. Where the agreement is unfair to one of the parties, however, the courts could refer to rules of construction to temper a harsh bargain, or rely on such equitable doctrines as undue influence and unconscionability to refuse to enforce the agreement in question.

As a general proposition, the British Columbia Commission favoured allowing spouses to decide how their rights are to be affected on marriage breakdown, subject to statutory protections against unconscionable bargains.¹⁷ This approach should also apply, in that Commission's view, to CPP credit division. Accordingly, the British Columbia Commission recommended that the British Columbia *Family Relations Act*¹⁸ be amended to permit a spouse to waive any right to or interest in a division of pension entitlement under the CPP. A spouse would still be able to apply unilaterally for division of credits.

The British Columbia Commission recommended that, in accordance with the *CPP Act*, the legislation require that the agreement must expressly mention the *CPP Act* and indicate the intention of the spouses that there be no division in accordance with that Act. Requiring a specific agreement avoids the possibility of rights being lost by a general waiver or release—commonly included in separation agreements—in circumstances where the spouses have overlooked rights in the CPP.

¹⁵ B.C. Report No. 123, *supra*, note 5.

¹⁶ B.C. Working Paper No. 65, *supra*, note 4, at 91-94.

¹⁷ *Ibid.*, at 95, 117, and B.C. Report No. 123, *supra*, note 5, at 61, 89.

¹⁸ *Supra*, note 14.

The Alberta Law Reform Institute (the Alberta Institute) examined the arguments for and against division of CPP benefits and came to a different conclusion. The Alberta Institute weighed, on the one hand, the view that the CPP is merely a government-sponsored savings vehicle, which would imply that the benefits “are property that should be no different in character from alienable property generally”, and, on the other, the view that the CPP is a social program, the benefits of which should be shared by spouses as a general rule.¹⁹ The latter view prevailed. Three principal considerations were relied on in reaching this conclusion: the data showing the prevalence of poverty among elderly women in retirement and the recognition that credit splitting was a response to this social problem; the existence of a December 1985 federal-provincial agreement that adopted the principle of credit splitting; and the degree to which a policy of no credit splitting would be a departure from the existing legislation. The Alberta Institute, in opting for an approach that would not permit spouses to contract out of the credit splitting but would eliminate some of the uncertainties, recommended that:²⁰

- (1) “the provisions for credit splitting on marriage breakdown under the *CPP Act* [should] be recognized as an acceptable mechanism for achieving the policy goal of the legislation, regardless of any conflict in principle with the scheme for property division” under the *Matrimonial Property Act*;²¹
- (2) “provincial legislation contemplated in section 55.2(3) of the *CPP Act*, which would permit spouses to agree that there is to be no division of CPP credits, [should] not be enacted”; and
- (3) legislation should be enacted “which declares that provisions in spousal agreements that purport to waive or alienate a spouse’s share of CPP credits or benefits [are] void”, thereby “eliminating the uncertainty in the existing law”.

(c) RECOMMENDATIONS FOR REFORM

The Commission supports the reasoning behind the Alberta Institute’s view that provincial legislation permitting spouses to waive or opt out of the federal CPP credit division scheme should not be enacted. More particularly, we believe that a high value must be placed on ensuring that individuals who have been

¹⁹ Alta. Report No. 58, *supra*, note 3, at 44.

²⁰ *Ibid.*, at 52.

²¹ R.S.A. 1980, c. M-9.

earning wages for a substantial period should share CPP benefits with their spouses.

We appreciate that our support for the mandatory nature of CPP credit splitting may appear inconsistent with our more general view that the division of pension assets should not be mandatory. CPP benefits are distinguishable from other pensions at source, however, on two grounds. First, CPP benefits, together with other social programs, constitute a publicly funded social security scheme, entitlement to which should not be waivable. Secondly, the division of CPP credits, given the universal and centralized nature of the CPP scheme, is administratively straightforward and therefore relatively inexpensive.

The Commission recommends that the type of provincial legislation envisaged by section 55.2(3) of the *Canada Pension Plan*, permitting spouses to waive mandatory division at source of Canada Pension Plan credits, should not be enacted in Ontario.

3. CANADA PENSION PLAN CREDITS AND EQUALIZATION

Finally, we must consider whether the transfer or division of CPP credits ought to be taken into account in the equalization process under the *Family Law Act*.²²

Entitlements under the CPP fall within the definition of "property" contained in the *Family Law Act*.²³ Accordingly, the value of entitlements earned during the marriage should be included in the calculation of net family property and accounted for in the calculation of the equalization claim. In practice, however, it appears that CPP credits are omitted from the calculation of net family property.²⁴

It has been suggested that "[t]here is an unfortunate lack of coordination between the *Family Law Act* and the Canada Pension Plan".²⁵ Under the *Family Law Act*, CPP entitlements constitute "property", which must be included in "net family property" and accounted for in the calculation of an equalization claim. No provision is made for the separate treatment of such benefits. The *CPP Act*,

²² *Supra*, note 2.

²³ *Ibid.*, s. 4(1).

²⁴ Catherine D. Aitken, "Pensions Under Part I of the Family Law Act of Ontario", in Special Lectures of the Law Society of Upper Canada 1993, *Family Law[:]* Roles, Fairness and Equality (Toronto: Carswell, 1994), at 8.

²⁵ Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (Scarborough, Ont.: Carswell, 1991), at 491.

however, mandates the division of pension credits on marriage breakdown if application is made to the Minister.

In the Ontario case of *Payne v. Payne*,²⁶ Misener L.J.S.C. held that CPP entitlements fall within the definition of "property" contained in the *Family Law Act*, 1986,²⁷ but for the following reasons should not be included in the calculation of net family property:²⁸

As I understand the provisions of the federal legislation that establishes this pension—the Canada Pension Plan ...—a division of unadjusted pensionable earnings between former spouses is compelled in the case of all judgments for divorce granted after 1st January 1987 without the necessity of an application by either of the former spouses....The only right in the Minister of National Health and Welfare to refuse such a division is satisfaction that it would be detrimental to *both* of the former spouses to make it.... Moreover, absent provincial legislation authorizing the court to do so (and I am not aware of any such legislation in Ontario), any order of the court that purports to nullify any such division is not binding upon the minister and therefore—at least as I interpret the rights and duties of the minister—must be ignored by him. Section 53.5(4) and (5) imposes a duty upon the minister to notify each of the former spouses of the periods of unadjusted pensionable earnings to be divided, and to attribute the division so made to each of the former spouses. Therefore, it seems to me that, quite apart from constitutional considerations, absent provincial legislation specifically authorizing the inclusion of Canada Pension benefits in the calculation of the net family property, I ought not to do so on the simple ground that to do so would grant or likely grant to Mrs. Payne a greater entitlement than the Family Law Act gives her.

The solution adopted in *Payne v. Payne* has been said to have "substantial practical advantages".²⁹ It acknowledges the practical reality that, in most cases, a division of pension credits will occur under the *CPP Act*, either automatically or on application. It also avoids the necessity of having to calculate the value of CPP entitlements, as well as the risk of overcompensation that might occur if the full value of CPP credits is included in the calculation of the equalization obligation and, subsequently, a mandatory split is effected. On the other hand, it is not entirely clear that this approach rests on a correct interpretation of the *Family Law Act*. As some commentators have observed, "[t]he objection to this solution is simply that it is not permitted by the *Family Law Act*".³⁰

²⁶ (1988), 16 R.F.L. (3d) 8 (Ont. H.C.J.).

²⁷ S.O. 1986, c. 4.

²⁸ *Payne v. Payne*, *supra*, note 25, at 12.

²⁹ *Ibid.*

³⁰ *Ibid.*

In favour of inclusion, it can be argued that because CPP pensions constitute a form of wealth, they should be included in the calculation of the value of each spouse's assets for equalization purposes as required by the *Family Law Act*. Further, if CPP credits are split, it may appear unfair to the spouse who loses credits to ignore this fact in determining the quantum of any further equalization that the Act requires, at least in cases where the equalization is not based on an equal division of assets. We note that this was the conclusion reached by the Alberta Institute in its report.³¹

On balance, we have concluded that the considerations in favour of excluding CPP pensions from net family property outweigh those against. In particular, the burden of valuation appears to be a very significant factor. For many parties, CPP pensions do not constitute a significant component of net family property. It would be inappropriate to require a complex valuation and then to require a mandatory division of CCP credits.

The Commission recommends that the definition of "net family property" in the *Family Law Act* should be amended to specifically exclude benefits payable to the spouse under *Canada Pension Plan*.

³¹ Alta. Report No. 58, *supra*, note 3, at 49-50.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 5 PENSION VALUATION UNDER THE *FAMILY LAW ACT*: DEFINED BENEFIT PLANS

INTRODUCTION

1. The *Family Law Act* should be amended to provide that the valuation of defined benefit plans for the purposes of determining an equalization entitlement under section 5 of the Act be made in accordance with "Pension Valuation Regulations" promulgated under that Act. (at 87)

CANADIAN INSTITUTE OF ACTUARIES' STANDARD OF PRACTICE

2. The proposed Pension Valuation Regulations should prescribe a method for valuing defined benefit plans that is based on the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993 to the extent that a particular standard, method, or principle has been mandated by that Standard. (at 88-89)

POST-SEPARATION SALARY INCREASES AND PLAN IMPROVEMENTS: TERMINATION OR RETIREMENT METHOD

3. The proposed Pension Valuation Regulations should provide that post-separation salary increases be considered in calculating the value of a defined benefit plan based on the approach set out in the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993, and the calculation should include a discount to reflect the possibility of termination of plan membership prior to the member reaching retirement. (at 106)
4. The proposed Pension Valuation Regulations should provide that pension plan improvements in existence at the time of settlement of the family property be considered in valuing the pension. (at 106)

**RECOGNITION OF PENSION BENEFITS UNVESTED ON
DATE OF MARRIAGE BREAKDOWN**

5. The definition of “property” in section 4(1) of the *Family Law Act* should be amended to include an interest in an unvested pension. (at 114)
6. The proposed Pension Valuation Regulations should provide that a pension plan that has not vested as of the date of marriage breakdown should be valued actuarially, with a discount for the possibility that plan membership will terminate prior to the occurrence of vesting. (at 114)
7. The proposed Pension Valuation Regulations should provide that, where an unvested pension is subject to the twenty-four-month membership vesting rules found in section 37 of the *Pension Benefits Act*, the pension should be deemed to be vested, and no discount should be made for the possibility of termination of plan membership prior to this vesting requirement being met. (at 114)
8. The proposed Pension Valuation Regulations should provide that the minimum value of an unvested pension should be equal to the member’s contributions plus an interest factor. (at 114)

PENSION COMMENCEMENT AGE

9. The proposed Pension Valuation Regulations should provide that, where a pension plan contains a provision for an early retirement benefit payable to a member on an unreduced basis once certain vesting requirements are met, such a benefit should be valued on the following basis:
 - (a) vesting of the unreduced early retirement benefit should be assumed for the purposes of pension valuation, and
 - (b) a discount for the possibility that plan membership will terminate prior to the member meeting the vesting requirements should be applied. (at 123)

10. The proposed Pension Valuation Regulations should provide that, in calculating the value of an unreduced early retirement benefit, a retirement date that is halfway between the earliest date on which an unreduced early retirement benefit would be available and the normal retirement date under the pension plan should be used as the retirement commencement date for the purposes of pension valuation. (at 130)

RECOGNITION OF BENEFITS PAYABLE ON DEATH

11. The definition of "property" in section 4(1) of the *Family Law Act* should be amended to include a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate. (at 138)
12. The *Family Law Act* should be amended to provide that a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate should be valued in accordance with the proposed Pension Valuation Regulations. (at 138)
13. The proposed Pension Valuation Regulations should provide that a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate should be valued on a single life basis in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993. (at 138)
14. The definition of "property" in section 4(1) of the *Family Law Act* should be amended to include the irrevocable right of the non-member spouse to a death or survivor benefit under the terms of a pension plan. (at 138)
15. The *Family Law Act* should be amended to provide that the irrevocable right of the non-member spouse to a survivor or death benefit under the terms of a pension plan should be valued in accordance with the proposed Pension Valuation Regulations. (at 138)
16. The proposed Pension Valuation Regulations should provide that the irrevocable right of the non-member spouse to a death or survivor benefit under the terms of a pension plan should be valued in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993. (at 138-39)

RECOGNITION OF NON-CONTRACTUAL INFLATION PROTECTION PRACTICES

17. The proposed Pension Valuation Regulations should provide that where there has been a history of non-contractual indexing affecting the calculation of pension benefits under a pension plan, the indexing should be included in the valuation of a pension, subject to a discount for the possibility of it not occurring in the future. (at 142)

ADJUSTMENT FOR VALUE AT DATE OF MARRIAGE

18. The proposed Pension Valuation Regulations should provide that the *pro rata* on service approach, as developed by the Canadian Institute of Actuaries in its *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993, should be used to adjust the value of the pension as of the valuation date as required by section 4(1) of the *Family Law Act*. (at 149)

INCOME TAX

19. The proposed Pension Valuation Regulations should provide that a discount for taxes payable on the pension benefit in the future should be applied in calculating the value of the pension in accordance with the Canadian Institute of Actuaries' *Standard of Practice for the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments*, 1993. (at 156)

DISCLOSURE BY PLAN TO NON-MEMBER SPOUSE

20. The *Pension Benefits Act* should be amended to require that the pension plan administrator be obliged to provide the non-member spouse with the information necessary to value the member's pension. (at 158)

CHAPTER 6 SHARING OF PENSIONS ON MARRIAGE
BREAKDOWN: PRELIMINARY CONSIDERATIONS

INTRODUCTION

21. A legislative scheme should be enacted ("pension division-at-source legislation") based on the recommendations made in chapters 6 and 7 of this report. (at 160)

FIFTY-PERCENT RULE

22. The proposed pension division-at-source legislation should provide that
- (a) in the case of the transfer of a lump sum out of a pension plan, no more than fifty percent of the value of the pension determined at the time of separation should be available for payment to a non-member spouse;
 - (b) in the case of the benefit split of a periodic pension payment, no more than fifty percent of the value of the pension determined at the time of retirement should be available for payment to a non-member spouse;
 - (c) either spouse may apply to court to assign more than fifty percent of the value of the pension on a transfer or benefit split, on giving notice to the plan administrator and to the other spouse;
 - (d) a court may vary the fifty-percent rule on such an application where the imposition of the fifty-percent rule would be "demonstrably unjust" in the circumstances of the case; and
 - (e) on an application to court to vary the fifty-percent rule, the court should consider whether a transfer in excess of the rule would violate section 42(2) of the *Pension Benefits Act* regarding solvency standards for transfers out of the pension plan where that issue is raised by the plan administrator. (at 181)

RIGHT TO PENSION DIVISION AT SOURCE OUTSIDE MARRIAGE BREAKDOWN

23. The proposed pension division-at-source legislation should provide that where one of two spouses dies, and where the surviving spouse has elected equalization under section 6 of the *Family Law Act*, the surviving spouse should not be entitled to pension division at source to satisfy an equalization obligation. (at 182)
24. The proposed pension division-at-source legislation should provide that, on an application to prevent improvident depletion under section 5(3) of the *Family Law Act*, pension division at source should be available to satisfy an equalization obligation. (at 183)

TYPES OF PENSIONS SUBJECT TO PENSION DIVISION-AT-SOURCE SCHEME

25. The proposed pension division-at-source legislation should apply to the following:
 - (a) pensions established by or under Ontario legislation;
 - (b) pensions registered under the *Pension Benefits Act*;
 - (c) pensions subject to reciprocal transfer agreements to the extent that such agreements cover Ontario employees and are administered in accordance with the *Pension Benefits Act*;
 - (d) deferred pensions as defined in the *Pension Benefits Act*;
 - (e) unvested pensions as defined in the *Pension Benefits Act*, but only in the form of a transfer;
 - (f) hybrid plans on the following basis:
 - (i) to the extent the pension plan is based on principles applicable to defined contribution plans, the plan should be divided in accordance with the recommendations set out in this report governing the division of defined contribution plans;

- (ii) to the extent the pension plan is based on principles applicable to defined benefit plans, the plan should be divided in accordance with recommendations set out in this report governing the division of defined benefit plans; and
 - (iii) a hybrid plan should be divided in accordance with a court order authorizing an appropriate method of division that is binding on the plan administrator, where the plan administrator is unable to divide the hybrid plan in accordance with the recommendations set out in this report;
- and
- (g) life income funds (LIFs) and locked-in retirement accounts (LIRAs), but only in the form of a transfer. (at 188-89)

DEFINITION OF SPOUSE

- 26. The proposed pension division-at-source legislation should apply to the pensions of cohabitants in accordance with the recommendations made by the Ontario Law Reform Commission in its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), provided that parallel amendments are made to the Ontario *Pension Benefits Act* and the federal *Income Tax Act*. (at 191)

ADMINISTRATIVE FEES

- 27. The proposed pension division-at-source legislation should proscribe the charging of a fee by the plan administrator to the member spouse and/or the non-member spouse for effecting a pension division at source. (at 195)

RETROACTIVITY

- 28. The proposed pension division-at-source legislation should provide that all existing orders and domestic contracts under section 51 of the *Pension Benefits Act* providing for plan-administered "if and when" arrangements that have not been implemented under the current legislation should be given full force and effect under the proposed legislation. (at 198)
- 29. The proposed pension division-at-source legislation should provide that all existing orders and domestic contracts that are made in contemplation of future reform of pension legislation should be given full force and effect under the proposed legislation. (at 198)

30. The proposed pension division-at-source legislation should provide that,
- (a) where spouses are subject to existing orders or domestic contracts providing for “if and when” arrangements under section 51 of the *Pension Benefits Act* that have not been implemented under the current legislation, or that have been made in contemplation of future reform of pension legislation, and
 - (b) where spouses are required to or wish to bring these orders or domestic contracts under the proposed pension division-at-source legislation,

either or both of the spouses may apply to a court to settle any terms concerning the manner in which existing orders and domestic contracts will be implemented under the proposed legislation. (at 198)

APPROPRIATENESS OF PENSION DIVISION AT SOURCE AS SETTLEMENT METHOD UNDER *FAMILY LAW ACT*

31. The proposed pension division-at-source legislation should provide that, where one of the assets subject to equalization is a pension, and where an application is made under section 7 of the *Family Law Act* to determine the appropriate settlement option under section 9 of the *Family Law Act*, the court should adopt the order of priority of settlement methods as set out below:
- (a) Where the pension is unvested (defined benefit plans and defined contribution plans), the following order should be adopted:
 - (i) cash payment;
 - (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation; and
 - (iii) any other order available under section 9 of the *Family Law Act*.
 - (b) Where the pension is an unmaturing, vested defined contribution plan, the following order should be adopted:
 - (i) cash payment;

- (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation; and
 - (iii) any other order available under section 9 of the *Family Law Act*.
- (c) Where the pension plan is an unmatured, vested defined benefit plan, the following order should be adopted:
 - (i) cash payment;
 - (ii) property orders, including an order transferring a portion of pension assets in accordance with the proposed pension division-at-source legislation;
 - (iii) any other order available under section 9 of the *Family Law Act*; and
 - (iv) a deferred benefit split in accordance with the proposed pension division-at-source legislation.
- (d) Where the pension plan is matured and vested (defined contribution plans and defined benefit plans), the following order should be adopted:
 - (i) cash payment;
 - (ii) any other order available under section 9 of the *Family Law Act*; and
 - (iii) an immediate benefit split in accordance with the proposed pension division-at-source legislation. (at 203-04)

CHAPTER 7 SETTTLING PENSION ASSETS ON MARRIAGE BREAKDOWN: TRANSFERS AND BENEFIT SPLITS

INTRODUCTION

32. The proposed pension division-at-source legislation should provide additional methods of settling an equalization entitlement arising under section 5 of the *Family Law Act*. (at 207)

33. Section 9(1) of the *Family Law Act*, which prescribes the methods by which an equalization entitlement may be settled, should be amended to permit the settlement of an equalization entitlement in accordance with the proposed pension division-at-source legislation. (at 207)
34. The proposed pension division-at-source legislation should provide that, in addition to the methods set out in section 9(1) of the *Family Law Act* for settling an equalization entitlement, the following options should be available where one of the family assets is a pension:
 - (a) a transfer of a portion of the value of the pension out of the pension plan to the benefit of the non-member spouse at the time of marriage breakdown; or
 - (b) a benefit split where the pension plan administrator is required to create two separate pensions providing periodic payments to the member and non-member spouses. (at 207)
35. The proposed pension division-at-source legislation should provide that the non-member spouse should have the option to transfer a share of the value of a pension plan to another locked-in pension vehicle to satisfy an equalization entitlement under the *Family Law Act*, in the following circumstances:
 - (a) where the pension is an unmatured defined benefit plan, or
 - (b) where the pension plan is an unmatured defined contribution plan. (at 207)
36. The proposed pension division-at-source legislation should provide that the benefit split be available in two forms:
 - (a) an immediate benefit split for the division of a matured defined benefit plan or a matured defined contribution plan, where a separate pension for the benefit of the non-member spouse is created on a projected settlement date; and
 - (b) a deferred benefit split for the division of an unmatured defined benefit plan, where the creation of a separate pension for the benefit of the non-member spouse is deferred until the date of retirement of the member. (at 207-08)

PROCEDURES FOR PENSION DIVISION AT SOURCE

37. The proposed pension division-at-source legislation should prescribe the following procedure for effecting pension division at source:
- (a) A spouse who wishes to initiate pension division at source should file with the plan administrator a Notice of Intention, signed by the spouse, in a form prescribed by regulation, containing the following information:
 - (i) the names of both spouses;
 - (ii) the addresses of both spouses (or the addresses of agents);
 - (iii) the birth dates of both spouses;
 - (iv) the date of separation; and
 - (v) the projected date of settlement, in the case of the division of a matured pension.
 - (b) On receiving a Notice of Intention, the plan administrator should provide, within a prescribed time period, to the non-applying spouse, a copy of the Notice of Intention and, to both spouses, the following information:
 - (i) the total commuted value of an unmatured defined benefit plan available for transfer as of the date of filing the Notice of Intention;
 - (ii) the total accumulated value of an unmatured defined contribution plan available for transfer as of the date of filing the Notice of Intention;
 - (iii) where the pension payments have already commenced, the value of the matured pension as of a projected settlement date set out in the Notice of Intention;
 - (iv) a copy of the last annual statement sent to the member spouse;

- (v) where the pension has not vested, the value of the unvested pension available for transfer on termination of the member's employment as of the date of filing the Notice of Intention;
 - (vi) the maximum dollar value of the pension available for transfer purposes under the fifty-percent rule; and
 - (vii) the maximum fractional interest of the pension available to be assigned on a benefit split under the fifty-percent rule.
- (c) In order to place a legal duty on the plan administrator to proceed with a pension division at source, the spouses should be required to file a Notice of Division with the plan administrator.
- (d) The form of the Notice of Division should be prescribed by regulation and should contain the following information:
- (i) the type of pension division at source requested (a transfer, an immediate benefit split, or a deferred benefit split);
 - (ii) the names and addresses of both spouses (or the addresses of agents);
 - (iii) the birth dates of both spouses;
 - (iv) the dollar figure to be transferred to the non-member spouse, or the fractional interest to be acquired by the non-member spouse in the case of a benefit split; and
 - (v) an affidavit that provides evidence of the creation and dissolution of the marriage.
- (e) The Notice of Division should be signed by both spouses, where an equalization entitlement is settled pursuant to a domestic contract under section 51 of the *Family Law Act*, or by a judge, where an equalization entitlement is settled by a court order under section 9 of the *Family Law Act*.
- (f) On receiving a Notice of Division, the plan administrator should provide to the non-member spouse, within a prescribed time period, the following information:
- (i) in the case of a benefit split, the information that would be provided to a new member; and

- (ii) in the case of a transfer, the information that would be provided to a member on termination of employment.
- (g) On receiving the Notice of Division, the plan administrator should effect pension division at source in accordance with the Notice of Division within a time period prescribed by regulation.
- (h) Where the plan administrator is unable to effect pension division at source because
 - (i) the Notice of Division is improperly filled out,
 - (ii) the requested division violates the fifty-percent rule, or
 - (iii) the requested division is contrary to the provisions of the *Pension Benefits Act* or the terms of the pension plan,

the plan administrator should return the Notice of Division to the spouses within a prescribed time period with a Request for Clarification identifying the deficiencies.

- (i) Where a Request for Clarification has been received by the spouses and where the spouses cannot agree on the terms that would cure the defect in a Notice of Division, either spouse should have the right to apply to court to have the terms of the Notice of Division determined.
- (j) Where the plan administrator fails to implement the Notice of Division within the prescribed time period, either spouse, on notice to the plan administrator and to the other spouse, should have the right to apply to court for an order directing the plan administrator to comply with the Notice of Division.
- (k) Where a plan administrator refuses to comply with an order under (j) and either of the spouses suffers financial loss as a result, that spouse should have the right to apply to court for the recovery of damages from the plan administrator respecting that loss.
- (l) The plan administrator should be discharged from its obligations to the spouses under the pension division-at-source legislation once the plan administrator has implemented a division in accordance with a Notice of Division that, on its face, reasonably appears to be enforceable.

- (m) The spouses should have the right to revoke a deferred benefit split at any time prior to pension commencement by filing with the plan administrator a Notice of Revocation in a form prescribed by regulation and signed by both spouses. (at 214-17)

TRANSFER AT TIME OF MARRIAGE BREAKDOWN

- 38. The proposed pension division-at-source legislation should provide that the amount transferred to satisfy an equalization obligation under the *Family Law Act*
 - (a) should be set out as a dollar figure in the Notice of Division;
 - (b) should not exceed fifty percent of the total value of the pension as determined at the time of filing the Notice of Intention;
 - (c) should be made in accordance with the provisions of the *Pension Benefits Act* respecting transfers on termination of employment; and
 - (d) should not violate the solvency restrictions on transfers provided for in section 42 of the *Pension Benefits Act* where that issue is raised by the plan administrator. (at 219-20)
- 39. The proposed pension division-at-source legislation should provide that, once a transfer is effected, the plan administrator should have no further obligation or duty toward the non-member spouse. (at 220)
- 40. The proposed pension division-at-source legislation should provide that the value of a defined benefit plan available for transfer purposes should be calculated in accordance with the provisions of the *Pension Benefits Act* that regulate the calculation of the value of defined benefit plans for transfer purposes on termination of the member's employment. (at 223)
- 41. The proposed pension division-at-source legislation should provide that the value of a defined contribution plan available for transfer purposes should be calculated in accordance with the provisions of the *Pension Benefits Act* that regulate the calculation of the value of defined contribution plans for transfer purposes on termination of the member's employment. (at 223)

42. A method for adjusting the pension interest of the member spouse in a defined benefit plan after a transfer out of the pension plan to satisfy a *Family Law Act* equalization obligation should be provided for in regulations promulgated under the proposed pension division-at-source legislation. (at 224)

DEFERRED BENEFIT SPLITS

43. The proposed pension division-at-source legislation should provide that the plan administrator may pay out a cash settlement in lieu of a benefit split to a non-member spouse where the value of the annual benefit payable to the non-member spouse is under the threshold for administration in accordance with section 50 of the *Pension Benefits Act*. (at 226)
44. The proposed pension division-at-source legislation should provide that, on a deferred benefit split,
- (a) prior to the commencement of pension payments and the creation of a separate pension for the non-member spouse, the member spouse should retain all rights under the pension plan except to the extent modified by the Commission's recommendations; and
 - (b) after the commencement of pension payments and the creation of a separate pension for the non-member spouse, the member spouse should retain all rights under the pension plan with respect to his or her remaining share of the pension. (at 228)
45. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, after the commencement of pension payments and the creation of a separate pension for the non-member spouse, the non-member spouse should have the rights of a member under the *Pension Benefits Act*, except to the extent modified by the Commission's recommendations. (at 228-29)
46. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, where the member spouse acts deliberately to jeopardize the interest of the non-member spouse in the pension plan prior to the pension commencement date, the member spouse should be personally liable for any loss occasioned by his or her behaviour. (at 229)
47. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, the plan administrator, at the time of the member's retirement, should be required to

- (a) obtain an actuarial valuation of the member's pension as of the pension commencement date of the member spouse;
 - (b) determine the non-member's share by applying the fractional interest as set out in the Notice of Division to the actuarial value of the member's pension;
 - (c) transfer the non-member's share of the member's pension to a separate account in the pension plan in the name of the non-member spouse;
 - (d) provide a separate pension to the non-member spouse based on the normal form under the pension plan, unless the normal form is a joint-and-survivor form;
 - (e) pay to the non-member spouse a monthly pension benefit actuarially valued over the life of the non-member spouse;
 - (f) adjust the value of the member's pension in accordance with the regulations; and
 - (g) after payment of the pension commences, provide an accounting to both spouses with respect to the recalculation of benefits. (at 232)
48. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, periodic payments for the non-member spouse should commence on the date on which the member elects to have his or her pension payments commence, and that, where the member has not retired by the normal retirement commencement date, the non-member spouse should be entitled to have his or her payments commence at the normal commencement date. (at 236)
49. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, where the member's employment is terminated on a voluntary or involuntary basis prior to the pension commencement date, the non-member spouse should be entitled to a share of the termination benefit based on the fractional interest of the non-member spouse in the member's pension as set out in the Notice of Division. (at 238)

50. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, in the event of the wind-up of the pension plan before the pension commencement date, the non-member spouse should be entitled to a payment of a share of any wind-up benefit paid to the member based on the fractional interest of the non-member spouse in the member's pension as set out in the Notice of Division. (at 240)
51. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, on the pre-retirement death of the member spouse, the non-member spouse should be entitled to a share of any death or survivor benefit paid on the life of the member spouse based on the fractional interest of the non-member spouse in the member's pension, as set out in the Notice of Division. (at 243)
52. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, on the pre-retirement death of the non-member spouse,
 - (a) the plan administrator should pay a death benefit on the life of non-member spouse consisting of a fractional interest, as set out in the Notice of Division, of the commuted value of the member's pension calculated in accordance with the Canadian Institute of Actuaries' *Recommendations for the Computation of Transfer Values from Registered Pension Plans* as of the date of the non-member spouse's death;
 - (b) the non-member spouse should be entitled to designate a beneficiary to receive the pre-retirement death benefit, but if no designation is made, the death benefit be payable to the estate of the non-member spouse;
 - (c) the member's pension should be adjusted in a manner prescribed by regulation after payment of the death benefit on the life of the non-member spouse; and
 - (d) the member spouse should have the option of paying the death benefit directly to the estate of the non-member spouse or the beneficiary designated by non-member spouse, thereby avoiding the dilution of his or her pension interest. (at 244-45)
53. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, the pension of the non-member spouse should include death benefits (other than the joint-and-survivor benefit) payable on his or her life under the terms of the pension plan. (at 247)

54. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, prior to the commencement of pension payments to the non-member spouse,
- (a) the plan administrator should provide the non-member spouse with copies of all information, correspondence, and documentation sent to the member spouse; and
 - (b) the non-member spouse should be entitled to individualized information from the pension plan in the event of the member's pre-retirement death on the member's retirement, on termination of employment by the member, and on a plan wind-up. (at 253-54)
55. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, after commencement of pension payments to the non-member spouse,
- (a) the non-member spouse should be treated as a member of the plan for information, disclosure, and reporting purposes; and
 - (b) the non-member spouse should no longer be entitled to information regarding the member's pension. (at 254)
56. The proposed pension division-at-source legislation should provide that, on a deferred benefit split, after payment of the pension commences, the plan administrator should provide an accounting to both the member spouse and non-member spouse with respect to the recalculation of benefits. (at 254)

IMMEDIATE BENEFIT SPLITS

57. The proposed pension division-at-source legislation should provide that, on an immediate benefit split, the plan administrator should be required to
- (a) obtain a recalculation of the member's pension as of a projected settlement date as set out in the Notice of Intention;
 - (b) determine the non-member's share by applying the fractional interest, as set out in the Notice of Division, to the recalculated value;
 - (c) transfer the non-member's share of the member's pension to a separate account in the pension plan in the name of the non-member spouse;

- (d) provide a separate pension to the non-member spouse based on the normal form under the pension plan unless the normal form is a joint-and-survivor form;
 - (e) pay to the non-member spouse a monthly pension benefit actuarially valued over the life of the non-member spouse;
 - (f) readjust the member's pension in a manner provided for in regulations; and
 - (g) provide an accounting to both the member spouse and the non-member spouse with respect to the recalculation of benefits.
(at 257-58)
58. The proposed pension division-at-source legislation should provide that annuities purchased by the plan administrator on the member's retirement and held by a third party insurance company be subject to division. (at 258)
59. The proposed pension division-at-source legislation should provide that, on an immediate benefit split, the non-member spouse should have the rights of a member under the *Pension Benefits Act*, except to the extent modified by the Commission's recommendations. (at 258)
60. The proposed pension division-at-source legislation should provide that, on an immediate benefit split, the member spouse should retain all rights under the pension plan with respect to his or her remaining share of the pension. (at 259)
61. The proposed pension division-at-source legislation should provide that, on an immediate benefit split, the pension of the non-member spouse should include death benefits (other than the joint-and-survivor benefit) payable on his or her life under the terms of the pension plan. (at 259)
62. The proposed pension division-at-source legislation should provide that, on an immediate benefit split, entitlement of the non-member spouse to a joint-and-survivor pension that arose prior to the immediate benefit split by virtue of the operation of section 48 of the *Pension Benefits Act* should be extinguished. (at 259)

CHAPTER 8 DIVISION OF CANADA PENSION PLAN CREDITS

63. The type of provincial legislation envisaged by section 55.2(3) of the *Canada Pension Plan*, permitting spouses to waive mandatory division at source of Canada Pension Plan credits, should not be enacted in Ontario. (at 265)
64. The definition of “net family property” in the *Family Law Act* should be amended to specifically exclude benefits payable to the spouse under *Canada Pension Plan*. (at 267)

APPENDIX A

GLOSSARY OF PENSION TERMS*

PENSION COMMISSION OF ONTARIO

* Reproduced with permission of the Pension Commission of Ontario, from *Understanding Your Pension Plan: A Guide for Members Of Employer Sponsored Pension Plans*, (1993), Appendix B.

ACCRUED PENSION — Amount of pension credited to a plan member according to service, earnings, etc., up to a given date.

ACTIVE MEMBERS — Employees currently working and who are members of a pension plan.

ACTUARY — A professional in the pension and insurance fields responsible for calculating insurance risks and premiums. In Canada, full professional recognition requires membership in the Canadian Institute of Actuaries.

ADDITIONAL VOLUNTARY CONTRIBUTIONS — Contributions to a pension plan made voluntarily by an employee in addition to those required for specific plan benefits. Extra benefits are purchased by the additional contributions but no additional cost is borne by the employer.

AD HOC ADJUSTMENT — Amount added to a pension after retirement or termination to compensate for increases in the cost of living on an irregular basis and not as a result of a prior commitment or contract.

ADMINISTRATOR — The person or persons who administer the pension plan, i.e., who arrange for pension payments, funding of the plan, etc.

ANCILLARY BENEFITS — Benefits in addition to regular pension benefits and survivor benefits such as bridging benefits and enriched early retirement benefits.

ANNUITY — In pension terminology, periodic payments (usually monthly) provided by the terms of a contract for the lifetime of an individual (the annuitant) or the individual and his or her designated beneficiary; may be fixed or varying amount, and may continue for a period after the annuitant's death.

ASSET MIX — The mix of assets refers to the proportions of various types of investments held by a pension fund, usually expressed as a percentage of total investments held in bonds, equities, real estate etc.

BENEFICIARY — In a pension plan, a person who on the death of a plan member or pensioner, may become entitled to a benefit under the plan (See Survivor Benefits, Death Benefits).

BENEFIT — Generally any form of payment to which a person may become entitled under the terms of a plan; often refers specifically to the normal pension provided by the plan formula.

BENEFIT FORMULA — Provision in a pension plan for calculating a member's defined benefit according to years of service and earnings (career or final average), a fixed dollar amount, etc.

BEST FIVE-YEAR AVERAGE — A defined benefit plan that applies the member's average earnings during the five years when earnings were highest.

BRIDGING BENEFITS — A temporary benefit provided to employees who retire prior to the age when OAS and CPP benefits are available (age 65) in order to supplement their pension income until these benefits apply.

CAREER AVERAGE PLAN — a defined benefit plan that applies the unit of benefit to earnings of the member in each year of service, and not to the final or final average earnings.

COMMUTED VALUE — Amount of an immediate lump-sum payment estimated to be equal in value to a future series of payments.

CONTINUOUS SERVICE — Period during which an employee is continuously employed by the same employer; may be defined in the pension plan (or by law) to include certain periods of absence, and/or service with an associated or predecessor employer. To be distinguished from Credited Service.

CONTRIBUTORY PLAN — A pension plan which requires the employees to make contributions by payroll deduction in order to qualify for benefits under the plan.

CREDITED SERVICE — Length of service used in the plan formula to calculate a defined benefit.

DEATH BENEFIT — A lump sum (usually), or a life annuity payable from a pension plan to the beneficiary or estate of a member who dies before retirement. May refer to a payment on death after retirement.

DEFERRED MEMBERS — Terminated employees eligible for a deferred vested pension.

DEFERRED VESTED PENSION — A specified pension determined at the time of termination of employment or termination of a plan but not payable until some later date, usually normal retirement age.

DEFINED BENEFIT PLAN — A pension plan that defines the pension to be provided (based on service, average earnings, etc.) but not the total contributions. If the plan is contributory, the rate of employee contributions may be specified, with the employer paying the balance of the cost. To be distinguished from a defined contribution plan.

DEFINED CONTRIBUTION PLAN OR MONEY-PURCHASE PLAN — A plan under which the amount of the employer contribution per plan member and, where applicable, the amount of the employee contribution is specified in advance and the benefits to be received by the retirees is calculated at the date of retirement based on the accumulated contributions and the investment yield on the accumulated contributions.

DIVISION OF PENSION CREDITS — Also known as “credit splitting”, a provision in pension plans or pension legislation whereby one spouse on dissolution of marriage, may obtain a share of pension credits earned by the other partner during the period of marriage or thereafter.

ELIGIBILITY REQUIREMENT — A condition such as age or length of service that must be met before an employee is permitted or required to join a pension plan. Term may refer to eligibility for certain benefits.

EMPLOYMENT PENSION PLAN — A pension plan offered by an employer or supported by a group of employers for the benefit of employees. The term includes plans covering employees of governments and the private sector, but does not include the Canada Pension Plan or other public programs.

FINAL PAY PLAN — A term commonly used for a pension plan in which benefits are based on earnings in a member's last years of service.

FLAT BENEFIT PLAN — A defined benefit plan that specifies a dollar amount of pension to be credited for each year of service.

FULLY FUNDED — A term describing a plan which, at a given time, has sufficient assets to provide for all pensions and other benefits in respect of service up to that date.

FUNDING — Systematic monthly payments into a fund which, with investment earnings on these funds, are intended to provide for pensions and other benefits as they become payable.

GUARANTEED ANNUITY — An annuity which will be paid for the lifetime of a person or for a certain period which ever is longer but in any event for a minimum period, e.g., if an annuitant with a five year guarantee dies after three years, payment will be continued to a beneficiary or the estate for two years.

INDEXING — A provision in a pension plan calling for periodic adjustments to benefits (usually after retirement) according to a formula based on a recognized index of price or wage levels, e.g., the Consumer Price Index.

INVESTMENT MANAGERS — Plan sponsors are frequently assisted by investment managers who help them decide how the pension funds should be invested. These managers are supervised by the plan sponsor.

INVESTMENT RETURN (YIELD) — Earnings of a pension fund including interest on fixed income securities (bonds, mortgages, etc.) dividends, capital gains, etc.

JOINT AND LAST SURVIVOR ANNUITY — An annuity payable until the death of the retired employee, and continuing thereafter to the surviving widow or widower until that person's death. Required to be provided as an option at time of retirement; may be equal in value to the retired employee's pension or reduced on his or her death.

LIFE INCOME FUND (LIF) — A prescribed retirement savings arrangement that can be purchased with funds locked in by pension legislation. Plan members, former members and their spouses or former spouses can purchase a LIF and begin receiving an income as early as age 55.

LOCKING IN — Legislative requirement that pension contributions cannot be withdrawn or otherwise forfeited on termination of employment if the employee is vested. (See Vesting)

MONEY PURCHASE PENSION PLAN — See Defined Contribution Plan.

MULTI-EMPLOYER PENSION PLAN — A pension plan covering employees of more than one employer, usually by agreement with a union or group of unions.

NON-CONTRIBUTORY PLAN — A plan in which all required contributions are made by the employer.

NORMAL RETIREMENT AGE — The age at which the member becomes entitled to retirement benefits.

PAST SERVICE — The period of service accrued by an employee before becoming a member of a pension plan. Term may be used to define certain benefits that differ from those of current service (future service).

PENSION — Generally, any regular periodic payment for the lifetime of a person who has retired from the service of an employer.

PENSION BENEFITS ACT — Ontario's legislation regulating employment pension plans. It specifies minimum benefit provisions, funding and solvency requirements and investment guidelines.

PENSION PLAN — A plan organized and administered to provide a regular income for the lifetime of retired members; other benefits that may be provided include payments on permanent disability, death, etc. (See also Annuity)

PLAN MEMBER — A Member of a pension plan.

PLAN SPONSOR — Refers to the employer sponsoring the pension plan for employees.

PORTABILITY — Options available to an individual on termination of employment. Relates to transferring the value of accumulated pension credits to a registered retirement savings plan account or to the plan of his or her new employer in order to facilitate retirement planning. Under the Pension Benefits Act an employee has these options in addition to the option of a deferred pension from the original plan at normal retirement age. (See also Vesting)

PRIVATE PENSION PLAN — An employment pension plan offered by an employer or by employers and unions in the private sector.

REGISTERED RETIREMENT SAVINGS PLAN (RRSP) — A personal retirement savings plan, defined in the Income Tax Act, allows contributions to be deducted from income (which is subject to taxation), and tax is deferred on contributions and investment income until income is received as annuity payments. (Locked-in RRSPs may not be converted to a Registered Retirement Income Fund.)

RETIREMENT — Withdrawal from the active work force because of age; may also be used in the sense of permanent withdrawal from the labour force for any reason, including disability.

RETIREMENT INCOME — Income from pension and other resources, to which a retired person is entitled. Term may include both private and public pension payments, income from personal savings, government income supplements, and certain other sources of income (e.g., free health insurance premiums).

SPOUSE — A man or a woman who:

- (a) are married to each other; or,
- (b) are not married to each other and are living together in a conjugal relationship:
 - (i) continuously for a period of not less than three years; or,
 - (ii) in a relationship of some permanence, if they are natural or adoptive parents of a child, both as defined in the Family Law Act.

SURPLUS — If a pension plan's assets exceed the plan's total liabilities, the difference is called a surplus.

SURVIVOR PENSION/SURVIVOR PENSION BENEFIT — A monthly benefit payable under a pension plan to the surviving spouse of a deceased employee or pensioner; usually refers to a benefit other than payments under the guaranteed annuity or joint survivor annuity provision.

TERMINATION OF EMPLOYMENT — Severance of the employment relationship for any reason other than death and retirement.

UNFUNDED LIABILITY — Generally, any amount by which the assets of a pension plan are less than its liabilities.

UPDATING (BENEFITS) — A term applied to the occasional review and increase of accrued benefits to reflect rising wage levels where the plan does not provide for automatic improvement as in final (earnings) formula.

VESTED BENEFITS (VESTING) — Benefits to which an employee is entitled under the plan as a result of satisfying age or service requirements; usually requires locking in of contributions as a result of membership in the plan for a specified period of time (two years under the Ontario Pension Benefits Act).

WINDING UP (OR WIND UP) — This occurs when a pension plan ceases to operate. All members are automatically vested and entitled to receive a pension from the company.

YEAR'S MAXIMUM PENSIONABLE EARNINGS (YMPE) — Term used in the Canada Pension Plan, which refers to the earnings from employment on which CPP contributions and benefits are calculated. YMPE is changed each year according to a formula based on average wage levels. YMPE is published annually by Health and Welfare Canada's Income Security Programs Office (refer to the blue pages in the telephone book for listing).

APPENDIX B

CANADIAN INSTITUTE OF ACTUARIES

STANDARD OF PRACTICE FOR THE COMPUTATION OF THE CAPITALIZED VALUE OF PENSION ENTITLEMENTS ON MARRIAGE BREAKDOWN FOR PURPOSES OF LUMP SUM EQUALIZATION PAYMENTS*

By authority of Council

Effective date: September 1, 1993

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STANDARD OF PRACTICE

FOR THE COMPUTATION OF THE CAPITALIZED VALUE OF PENSION ENTITLEMENTS ON MARRIAGE BREAKDOWN FOR THE PURPOSES OF LUMP-SUM EQUALIZATION PAYMENTS

1. PREAMBLE

The Council of the Canadian Institute of Actuaries has approved the following standard of practice for conduct of a member (hereinafter called the **actuary**) when engaged to compute, or specify the basis to be used for the computation of, the value of a pension entitlement on marriage breakdown for purposes of lump-sum equalization payments under provincial "Family Law Acts" or similar statutes. This standard of practice defines the approved principles by which an actuary shall determine the value of the entitlement of a plan member or the plan member's beneficiary (hereinafter collectively called the **plan member**). This standard of practice represents a basis that is not biased in respect of either the plan member or the spouse of the plan member. Note that no bias for or against a plan sponsor can occur, since this standard of practice does not address in-plan credit-splitting. When viewed after the fact, a lump-sum capitalized value may prove to have recognized certain potential entitlements that are never realized, or may prove to have disregarded certain entitlements that provide additional value. This is a natural product of developing a present value with allowance for future contingent events, and does not constitute a bias in respect of the plan member or the spouse of the plan member.

This standard of practice supersedes all previous drafts, including the Institute's discussion draft entitled "Recommendations Concerning the Capitalized Value of Pension Entitlements on Marriage Breakdown" dated November 1988. The 1988 recommendations never became a binding standard, but were approved by the Institute for early implementation as communicated to the membership in a memorandum dated January 16, 1989.

This standard of practice does not necessarily establish a satisfactory method of determining the value of pension entitlement on marriage breakdown for purposes of credit-splitting under provincial pension benefits legislation or equivalent (example: Section 29(2)(a)(iii) of New Brunswick Regulation 91-195 under the Pension Benefits Act, O.C.91-1060, filed December 9, 1991). Some legislation prescribes valuation assumptions and/or methods which

may contain biases for or against a plan member, the plan member's spouse, or the plan sponsor. Where applicable legislation prescribes valuation assumptions and/or methods, the actuary shall compute credit-splitting entitlements as an agent of the plan administrator using prescribed valuation assumptions and/or methods. Generally, such legislation may mandate the calculation of commuted values "...calculated as if the member or former member had terminated membership on the date mentioned in the order... (pursuant to The Matrimonial Property Act)."⁽¹⁾ Where literal presumption of termination of membership is mandated, the actuary should compute values in accordance with the Institute's Recommendations for the Computation of Transfer Values from Registered Pension Plans, in accordance with subparagraph (d) of Section 1 thereof. Where no valuation methods and/or assumptions are prescribed in applicable legislation, this standard of practice shall apply.

The results reported by the actuary should be independent, regardless of whether the actuary has been engaged by a plan member (or the plan member's counsel) or by the spouse of the plan member (or the counsel of the plan member's spouse). To the extent that this principle is not adhered to, the actuary must clearly state that the report is not in compliance with this standard of practice and disclose all areas of noncompliance.

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This standard of practice applies to all reports prepared on or after the effective date cited on the face page. Actuaries are encouraged to implement this standard of practice at an earlier date. Where a report prepared prior to the effective date is revised, updated, modified or otherwise changed, the actuary must disclose all areas of noncompliance in the prior report, and develop the changed report in accordance with this standard of practice. If an actuary is called upon to testify in respect of a report prepared prior to the effective date of this standard of practice, the actuary should be prepared to identify all areas not in compliance with this standard of practice, and should be prepared to quantify the effect of any aspect not in compliance with this standard of practice.

This standard of practice (which may be referred to briefly as the "Standard of Practice for Marriage Breakdown Computations") deals with economic and demographic assumptions to be used in the valuation of pension entitlements on marriage breakdown for the purposes of lump-sum

(1) This phrase is taken from Section 47(2) of The Pension Benefits Act, 1992, of Saskatchewan.

equalization payments under provincial "Family Law Acts" or similar statutes, with the methods that may be employed for such valuations and with the content of actuarial reports on such valuations. Specific recommendations are made with regard to the methodology to be used in such valuations. The actuary should become familiar with requirements of the relevant jurisdiction for the case and should endeavour to meet fully these requirements. The actuary should also understand fully the difference between an assumption and a matter of fact. Factual matters are subjects for direction by the counsel(s) or decision by a court.

Actuaries must be aware that the Institute has promulgated Recommendations for the Preparation of Actuarial Reports and the Presentation of Evidence be the Courts and Other Tribunals and Recommendations for the Computation of Transfer Values from Registered Pension Plans. The standard of practice contained herein is intended to complement such other standard of practices, not replace or override them. An actuary dealing with the computation of the capitalized value of pension entitlements on marriage breakdown for purposes of lump-sum equalization payments must follow all applicable standards of practice.

The actuary must be careful to avoid any undisclosed conflict of interest and must be sensitive to situations which may be perceived by others to be conflicts of interest. In particular, if the actuary making the evaluation also provides actuarial services in connection with the plan concerned, that matter must be disclosed in the report of the valuation. If the actuary is aware that (s)he is an employee of an actuarial firm which provides services in connection with that plan, that matter must also be disclosed in the report of the valuation. An actuary must make every reasonable effort to ascertain whether his or her firm provides services in connection with that plan. If, after reasonable effort, it is unclear whether the firm provides services in connection with the plan, the actuary must state that after taking such reasonable steps, any business relationship remains unclear.

For the purpose of the above paragraph, it is not a conflict of interest to be engaged in the capacity of an expert by the plan member only (or for the plan member's counsel), or by the spouse of the plan member only (or the counsel of the spouse of the plan member). Nevertheless, the actuary remains compelled to disclose in a report by whom the actuary was engaged.

2. TERMINOLOGY

Actuary means a member of the Institute engaged to perform, or to provide the basis for, the valuation of a person's pension entitlement under a pension plan or similar program in connection with a lump-sum equalization of property on marriage breakdown.

Method means either the retirement method or the termination method, as each term is described below.

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Pension entitlement means benefits provided through any pension plan or similar program payable to a plan member or a plan member's designated beneficiary. The value attributable to a plan member shall exclude any value that is irrevocably vested in the (separated/divorced) spouse of the plan member, and shall further exclude any value that may be provided in respect of a future spouse. The (separated/divorced) spouse may possess an irrevocably vested survivor benefit entitlement that also requires an actuarial valuation, and if so, the actuary must value such entitlement, also in accordance with this standard of practice.

Present value means the value as determined by the actuary on a specified date of a person's pension entitlement under a pension plan or similar program.

A "pension plan or similar program" includes not only registered pension plans, but also includes nonregistered plans that may exist under contracts of employment, excess or top-up plans and retirement compensation arrangements. Partnership buy-out agreements upon retirement, sick-leave buy-out programs, or lump-sum allowances upon retirement may or may not be valued using this standard of practice; appropriate disclosure is required in any event. Such plans or programs do not include individual or group contracts of insurance whose primary purpose is to provide death benefits only or disability benefits only.

Retirement method means a projected accrued benefit valuation method, with salary projection where appropriate.

Termination method means an unprotected accrued benefit valuation method. No increase in accrued benefits shall be reflected, except to the extent such increases are provided to deferred vested pension plan members.

Valuation date means the date as at which a value is being computed, generally, the date of marriage or the date of separation, but also possibly the date of death or a date determined by the court.

For both the retirement method and the termination method, future benefit accruals and possible (or known, with the benefit of hindsight) plan improvements are disregarded. Literal termination of employment or membership is not contemplated. Accrued benefit enhancements and grow-in ancillary benefits (such as the right to unreduced early retirement subject to total age/service combinations, and/or bridging benefits) contingent only upon future service, to the extent accrued at the valuation date, must specifically be addressed by the actuary.

The phrase “must specifically be addressed” means that the actuary must present a separately identified value of such benefits, without any discount for possible future forfeiture.

YMPE means the year’s maximum pensionable earnings, as defined in the Canada Pension Plan or the maximum pensionable earnings, as defined in the Québec Pension Plan, whichever may be applicable.

3. GENERAL PRINCIPLES

The underlying principle in this standard of practice is that the reported present value shall be determined in a manner which is equitable to both the plan member and the plan member’s spouse. This consideration may require the use of actuarial methods and assumptions different from those employed in determining the present values of pension entitlements for other purposes, including funding, solvency, accounting for pension costs, merger/ acquisition/ divestiture, or transfer values.

The actuary must take into account all ancillary benefits and available options which are considered material, consistent with the methodology specified in this standard of practice.

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Where the actuary is aware that a valuation made as of a date slightly earlier or later than the valuation date would result in a materially different value, due to the design of the plan, the timing of a plan amendment, or circumstances of the plan member, the actuary should disclose this fact.

The reported value should not be reduced on account of the pension plan not being fully funded. If the actuary is aware of extraordinary circumstances wherein the pension plan has defaulted or may reasonably be expected to default upon pension promises or expectations, the actuary should disclose such awareness, and may suggest an appropriate reduction.

Practices in the relevant jurisdiction (i.e., "case law") may determine whether the actuary should utilize the termination method or the retirement method. Case law may also determine details of application of the relevant valuation method. The actuary should not utilize a method or an approach that is inappropriate for the applicable jurisdiction.

Consider the following example.

At valuation date #1 (e.g., marriage), the plan member had 10 years pensionable service, had accrued \$2,000 of annual pension entitlements, which at that date had a value of \$5,000. At valuation date #2 (e.g., separation), the plan member had 25 years pensionable service, had accrued \$30,000 of annual pension entitlements, which at that date had a value of \$240,000.

There are three possible approaches to addressing a member's pension entitlement acquired during marriage. One approach is sometimes referred to as "value added". Such approach develops the pension asset acquired during marriage as follows:

$$\$240,000 - \$5,000 = \underline{\underline{\$235,000}}$$

A second approach is sometimes referred to as *pro-rata* (on benefits). Such approach develops the pension asset acquired during marriage as follows:

$$\frac{(\$30,000 - \$2,000)}{\$30,000} * \$240,000 = \underline{\underline{\$224,000}}$$

A third approach is sometimes referred to as *pro-rata* (on service). Such approach develops the pension asset acquired during marriage as follows:

$$\frac{(25 - 10)}{25} * \$240,000 = \underline{\underline{\$144,000}}$$

One of the features of contributory pension plans is that upon literal termination of employment, a plan member will be entitled, as a minimum, to a return of contributions, with accumulated interest.

Pension legislation typically mandates that upon literal termination of employment, a plan member's accumulated contributions may not provide more than 50% of the value of certain pension entitlements. This is commonly called the "50% rule", and typically operates as in the following example.

A pension plan member terminates employment, and has pension entitlements, to which the 50% rule applies, with a value of \$10,000. The member has related contributions with accumulated interest thereon totalling \$8,000. Only \$5,000 of the member's accumulated contributions with interest may be applied towards the \$10,000 value; the remaining \$3,000 is "excess". Thus, at termination, the plan member's total termination entitlement is \$13,000.

Where case law dictates that early retirement options are not considered for Family Law Act valuation purposes, the 50% rule should not reflect any additional values resulting from a reduced early retirement option.

The terms of certain pension plans may contain other contribution-related minimum benefit entitlements upon termination of employment (example: a member's total entitlements will never be less than 200% of accumulated member contributions, with interest).

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Where any of the values shown in the report exceed the value the member would have received if the member had terminated employment on the valuation date, this fact should be disclosed.

Prior to any adjustment for income tax, the value of a member's pension entitlement must not be less than the amount the member would have received had the member literally terminated employment at the valuation date, under the assumption that transfer value is determined using sex-distinct mortality rates. The actuary may show in a report values reflective of a contribution-related minimum benefit provision either separately or in aggregate.

The actuary shall disclose in the report on the valuation complete information regarding the data, and assumptions and methods used in the valuation. The report must state whether it has been prepared in conformance with this standard of practice. If the report has not been prepared in conformance with this standard of practice, it must specifically disclose any areas of nonconformance and the reasons for such nonconformance.

The cost of performing the complex calculations that are necessary to provide values in accordance with methods, assumptions and other relevant aspects of these recommendations is an unacceptable rationale for failing to comply with professional standards of practice. The Institute recognizes that customary actuarial fees may present a hardship in certain circumstances, and has committed to exploring this matter further. In the interim, where the pre-tax lump-sum value of such pension is less than \$10,000, the actuary may issue an "abridged" report, saying in effect: "I am going into no detail, but I assure you that all my calculations conform to accepted practice." Despite limited disclosure, the actuary should certify that the values contained in his or her report have been computed in accordance with this standard of practice in all respects. The actuary should be prepared to justify his or her work, if called upon to do so. This interim process shall apply for reports issued until the earlier of August 31, 1994, and the release of further standards of practice addressing this specific matter.

4. ACTUARIAL ASSUMPTIONS

The number and nature of assumptions required in particular valuation depend on the terms of the pension plan and the valuation method being used. Assumptions should be made regarding all factors having a material effect on the present value, excluding such factors which are matters of fact.

In many situations, accurate accrued benefit information may be available as at a date somewhat before or somewhat after a required valuation date. In such situations, the actuary may make reasonable projections to develop the benefit entitlements at the required valuation date. Where accurate benefit information requires a projection over a period of greater than one year, the actuary shall indicate in the report that current accurate data is unavailable, and as such, the quantifications presented in the report may be unsatisfactory.

Approximations may be used where the effect on the present value of using an approximation rather than a more detailed analysis is not material. By way of example, if the applicable economic assumption called for use of an annual rate of interest of 6% applied for the period January—April, inclusive and then an annual rate of interest of 3% applied for the period May—December, inclusive, an acceptable approximation could be to utilize an annual rate of interest of 4% applied for the entire period January—December, inclusive.

a) **Demographic Assumptions**

Mortality — The mortality basis selected shall be one considered representative of the experience of pension plan members in general, modified if appropriate to reflect a medically determinable impaired state of health of the particular plan member. Tables commonly referred to as “population” mortality tables normally are not appropriate, whether in respect of a plan member, former plan member or a spouse.

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The table should be a sex-distinct table. Unisex mortality is not permitted. Unless and until a subsequent table is adopted and becomes generally accepted, in which case the Institute will effect an appropriate announcement, acceptable mortality tables are the 1983 Group Annuity Mortality Tables (male or female, as applicable), as published on pages 880 and 881 of Volume XXXV of the *Transactions* of the Society of Actuaries.

No modification shall be applied to the table to reflect an impaired state of health merely because the member is a “smoker”.

Marital Status — For all valuation purposes, except where any benefit entitlements are irrevocably vested in the (separated/divorced) spouse, the plan member should be viewed as single. Specifically, any entitlements that may be granted in respect of a future spouse shall be disregarded. Where any benefit entitlements are irrevocably vested in the (separated/divorced) spouse (as is often the case in respect of a pension in the course of payment), the actuary shall develop values that both

- (i) include such benefit entitlements; and
- (ii) exclude such benefit entitlements.

Values for (ii), above, apply to the member. The difference in values ((i)-(ii)), applies to the spouse of the plan member.

An assumption that a member is “single” is not a direction that death benefits provided by the pension plan or similar program be disregarded. Where the plan member can control a beneficiary appointment or otherwise realize some value for the death benefit entitlements (such as through a potential transfer of such value to any form of RRSP, etc., upon actual termination of employment), such death benefits normally would be valued, and may be shown separately.

Where a plan member is single and may elect an alternative form of benefit in lieu of a spousal pension, the value of the alternative form of benefit should be determined.

Retirement Age — The appropriate retirement age may depend on the retirement provisions of the particular pension plan. Generally, retirement age is viewed by the courts as a question of fact, not as an assumption that is the exclusive province of the actuary. If the question of fact is not clearly resolved before the actuary develops the report, values must be shown at least for the following potential retirement ages:

- the earliest age at which an immediate unreduced pension could be elected by the plan member, contingent only upon uninterrupted future service
- the earliest age at which an immediate unreduced “full” pension could be elected by the plan member, contingent only upon uninterrupted future service (a “full” pension is defined in this context, for example, as a 35-year service pension where plan terms restrict pension credits to 35 years of pensionable service)
- the earliest age at which an immediate unreduced pension could be elected by the plan member, if the member provided no further service beyond the valuation date
- the normal retirement age defined in the plan

Such an approach develops a set or range of values which are predicated upon determination of fact.

No consideration of future service is applicable where the plan member terminated employment prior to the valuation date (i.e., date of separation).

If the member is known to have terminated after a valuation date but before the date the report was prepared, the actuary should normally exclude any nonvested enhancements which the employee forfeited and disclose that such benefits have been excluded.

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As the actuary does possess some expertise with respect to an appropriate retirement age or ages, if the issue of retirement age is not a known fact, the actuary may suggest an appropriate age or range of ages for purposes of narrowing a range of values, or replacing a range of values with a fair and reasonable single value.

Pension plans often provide reduced early retirement provisions that provide enhanced values if accessed. Whether an actuary must disclose the amount of enhanced values for reduced early retirement provisions is largely a matter of law (the report must disclose the existence of any such enhancements, in any event), and the actuary is expected to be familiar with such circumstances, or clearly disclose otherwise. By way of guidance, for reports under Ontario jurisdiction, any enhanced values afforded by reduced early retirement entitlements would not normally require quantification.

Disability — The possibility of future early retirement (and hence added value) as a result of a future disability essentially provides a disability income, and, as such, this possibility should be disregarded. Where benefit accruals continue during disability, the possibility of future disability may not be relevant, and hence may be disregarded.

Salary Increases — Under the termination method, future salary increases are disregarded. Under the retirement method, assumed future salary increases should be consistent with applicable interest rates and other economic assumptions.

YMPE — Where accrued benefit entitlements are developed under an integrated concept (i.e., if the benefit provides x% of earnings up to the YMPE and y% of excess earnings), the YMPE shall be deemed to accrue on a *pro-rata* basis. By way of example, in 1992 the YMPE was \$32,200; at March 31, 1992, one quarter of the YMPE has accrued, namely \$8,050. To pursue this example, if plan terms call for a three-year average YMPE, such average will also reflect 100% of the 1991 and 1990 YMPEs, and 75% of the 1989 YMPE.

Alternatively, where terms of the pension plan provide that benefits related to average YMPE are based upon annual determination of the YMPE, a *pro-rata* application need not be followed.

Other Demographic Factors — Where the plan provides benefits in respect of other demographic factors, these should be taken into

account, where the value is material, in a manner consistent with the method being used in the valuation. For example, if the number or age of children is relevant, it would be appropriate to reflect the actual status as it applies to the plan member at the valuation date.

b) Economic Assumptions

The set of economic assumptions to be used will vary based upon the valuation date of marriage breakdown (i.e., date of separation). Where the marriage breakdown valuation date is on or before August 31, 1993, the economic assumptions to be utilized in a report will reflect the assumptions specified in the 1988 exposure draft. Where the marriage breakdown is on or after September 1, 1993, the economic assumptions to be utilized in a report will be in accordance with the revised requirements discussed below. The economic assumptions to be utilized to develop a capitalized value at marriage shall be based upon the same external indices (determined as of the date of marriage) as used in the calculations done at the date of marriage breakdown. For greater certainty, this does not mandate identical economic assumptions at separation and at marriage; the applicable economic assumptions are time-sensitive, and only coincidentally will be identical at marriage onset and marriage breakdown.

Sometimes, the date of marriage breakdown is in dispute, and the actuary is directed to prepare a report at two dates. If such dates straddle September 1, 1993, the actuary shall use economic assumptions applicable to a post September 1, 1993 marriage breakdown.

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Economic assumptions vary depending on whether the pension is fully indexed, partially indexed or nonindexed. The reported value of a fully or partially indexed pension must be at least equal to the reported value applicable to a nonindexed pension in the same amount and having similar characteristics.

The following sets forth applicable economic assumptions for valuation dates of marriage breakdown at or before August 31, 1993:

- For nonindexed pensions, the interest rate for the first 15 years from the valuation date should be the month-end value of the nominal rate of interest on long-term Government of Canada bonds (CANSIM series B14013) in the second calendar month preceding

the month in which the valuation date falls rounded to the next higher multiple of 0.50%. After the first 15 years, the interest rate should be 6.00%. Thus, if the valuation date is April 15, 19XX, and the February, 19XX month-end CANSIM Series B14013 rate is 8.20%, an initial valuation rate of 8.50% applies.

- For pensions which are fully indexed (i.e., where the pension increases by the same percentage as the Consumer Price Index) in either the deferral period and/or while in course of payment, the net rate of interest should be set initially as the difference, rounded up to the next multiple of 0.50%, between the interest rate applicable to nonindexed pensions (as described in the preceding paragraph) and the rate of increase in the Consumer Price Index on an annualized basis, determined by dividing the average of the monthly Consumer Price Index for Canada (all items) for the month preceding the month in which the valuation date occurs, by the corresponding average Consumer Price Index for the same month one year earlier. The initial rate should apply for the first year and be reduced or increased in equal annual increments to a long-term net rate of 3.00% per year over a five-year period.

The following sets forth applicable economic assumptions for valuation dates of marriage breakdown at or after September 1, 1993:

- For nonindexed pensions, the interest rate for the first 15 years from the valuation date should be the month-end value of the nominal rate of interest on long-term Government of Canada bonds (CANSIM series B14013) in the second calendar month preceding the month in which the valuation date falls, adjusted as follows:
 - i) add 0.50%
 - ii) translate the resulting nominal rate, which is based upon semiannual compounding into an effective annual rate: and,
 - iii) round to the nearest integral multiple of 0.25%.

After the first 15 years, the rate should be 6.00%

Thus, if the valuation date is April 15, 19XX and the February, 19XX month-end CANSIM Series B14013 rate is 8.20%, the initial valuation interest rate is 9.00% (8.70% nominal first becomes 8.8892% effective, then becomes 9.00% upon rounding).

- For pensions which are fully indexed (i.e., where the pension increases by the same percentage as the Consumer Price Index) in both the deferral period and in course of payment, the net rate of interest for the first 15 years from the valuation date should be the month-end value of the real rate of interest on long-term Government of Canada real return bonds in the second calendar month preceding the month in which the valuation date falls, adjusted as follows:

- i) add 0.25%
- ii) translate the resulting nominal rate, which is based upon semiannual compounding into an effective annual rate; and,
- iii) round to the nearest integral multiple of 0.25%.

After the first 15 years, the rate should be 3.25%.

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Real return bonds have a history which begins in late 1991. For periods which pre-date such history, any applicable month-end value is deemed to be 4.50%. Essentially, this means that the primary net valuation rate is 4.75% (rounded from 4.8064%) for a fully indexed pension.

c) Practices to Address Partial Indexing

For pensions which are partially indexed, the actuary should develop applicable net rates of interest that fall appropriately between the corresponding rates applicable to nonindexed and fully indexed pensions. The following examples illustrate this approach:

- i) The plan provides indexing equal to "CPI.-1%"

Apply interest rates for a fully indexed pension, plus 1% (but not in excess of the corresponding nonindexed rate).

- ii) The plan provides indexing equal to "75% of CPI."

Apply interest rates that are a weighted average of fully indexed rates (weighting 75%) and nonindexed rates (weighting 25%).

- iii) The plan provides indexing equal to "75% of CPI, less 1%."

Apply interest rates that are a weighted average of fully indexed rates (weighting 75%) and nonindexed rates (weighting 25%), plus 1% (but not in excess of the corresponding nonindexed rate).

- iv) The plan provides indexing under an "excess interest" concept, based upon net investment yield above X%.

Apply an interest rate of X%, subject to a maximum rate of interest equal to that for a nonindexed pension, and a minimum rate of interest equal to that for a fully indexed pension.

The net rate of interest developed using this approach should then be used without further rounding, regardless of whether the resulting rate is a multiple of 0.25%.

Where increases in benefits are related to increases in the average wage index, the actuary should assume that the average wage index will increase at rates that are one percentage point higher than the underlying rates of increase in the Consumer Price Index each year. The pension should then be valued using the interest rates applicable to partially or fully indexed pensions.

A deferred pension that is indexed only after the expiry of the deferral period should be valued using the interest rate applicable to a nonindexed pension during the deferral period and the interest rate applicable to the particular type of indexed pension after the commencement date of the pension.

A deferred pension that is indexed only during the deferral period should be valued using the interest rate applicable to the particular type of indexing in the deferral period, and the interest rate applicable to a nonindexed pension after the pension commences.

In cases where the plan does not provide contractual indexing, the actuary must attempt to ascertain whether the plan sponsor has established a regular and repeated practice of providing periodic pension increases on an *ad hoc* basis. Such practice shall be ascertained separately for pensions in the course of payment (in which case, the plan would be valued as wholly or partially indexed after the deferral period), and for deferred vested members prior to commencement of pension (in which case, the plan would be valued as wholly or partially indexed during the deferral period). Where such increases are known to have been provided in the past, the valuation must make provision for

the continuation of this practice, unless there is significant evidence to the contrary (e.g., pension agreement excludes indexing

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where it has previously been included). The incremental value of such potential future adjustments may be reported separately from the present value which excludes allowance for such adjustments. The actuary should clearly disclose the assumption that is being made regarding the continuance of post-retirement adjustments and should preface the value of such adjustments with wording such as "If the plan sponsor's past practices were to continue,..."

Where potential adjustments are not taken into account in the valuation (such as where past practice has not been regular or repeated, or where based upon past precedent, any future *ad hoc* increases appear unlikely), this fact should be disclosed in the actuary's report. (In cases where the actuary is unable to determine whether or not such increases have been provided in the past, this fact should be clearly disclosed. In such cases, the actuary should develop values which provide the user of the report with assurance in the quantification of the added value.

If the retirement method is used in the valuation of a pension entitlement under a career average earnings or flat benefit plan, the actuary should attempt to ascertain whether accrued benefits have been increased on a regular basis in the past. Where such increases have been provided in the past, the valuation may make provision for the continuance of this practice, and the actuary's report should contain wording similar to that described above for *ad hoc* post-retirement adjustments. However, the incremental value of such potential future benefit increases should be reported separately from the present value excluding such increases. Where such potential future increases are not taken into account in the valuation, this fact should be disclosed in the actuary's report. In cases where the actuary is unable to determine whether or not such increases have been provided in the past, this fact should be disclosed.

5. INCOME TAX

Pensions differ from most other family assets in that they are available to a member only after payment of applicable federal and provincial income tax. The gross (pre-tax) value of a pension asset may require reduction to reflect income tax, in order to develop a net capitalized value for lump-sum equalization payment purposes.

In certain circumstances, where it is clear that the value of a member's pension will be settled by an offset against another similar pre-tax asset, such as the pension of the spouse of the member, then an adjustment for income tax may be ignored as a simplifying measure. In such circumstances, the actuary must clearly explain why a deduction for income tax has not been applied. In other circumstances, where it is clear that the value of a member's pension will be settled by a transfer of a similar pre-tax asset, such as the member's accumulated RRSP balance, then an adjustment for income tax may also be ignored as a simplifying measure. Again in such circumstances, the actuary must clearly explain why a deduction for income tax has not been applied.

If a deduction for income tax is developed by the actuary, then the applicable deduction shall be based upon the member's anticipated retirement income computed in "current" dollars, including accrued and projected future pension income, CPP and OAS entitlements. Other income anticipated may be reflected. Where reflected, the actuary shall disclose the amount of such anticipated other income. Upon projecting retirement income in current dollars, the actuary shall apply the deduction developed as the average tax rate paid at the most recent date for which relevant information is available by a similar single retired taxpayer with specified deductions, generally limited to age, personal and pension, unless applicable case law in the jurisdiction requires a different treatment. The actuary may also disclose the change in applicable deduction for other proximate levels of income. The actuary may or may not make allowances for the fact that tax brackets are only partially indexed, but should disclose the approach which has been followed.

When the actuary does not develop a deduction for income tax, the report must clearly so state.

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6. DISCLOSURE AND STATEMENT OF COMPLIANCE

The actuary's report on the valuation shall include a description of the data, methodology and actuarial assumptions used in the valuation. The description should include at least the following:

- a summary of relevant personal data for the plan member whose pension entitlement is to be valued, of the amount of pension entitlement, or of the factors governing the amount of entitlement and of

the amount of the individual's contributions to the plan with accumulated interest, if applicable. The actuary should identify the sources of this information;

- a brief summary of the provisions of the pension plan relevant to the valuation of the pension entitlement, together with a statement of the source of this information. The report should specifically indicate whether or not the actuary was provided with the governing plan documents and, if so, should state the date indicated on such documents;
- a description of the methodology employed in the valuation, including disclosure of any ancillary benefits which were not taken into account, and a description of any indexing provisions or practices which were taken into account;
- a statement of how income tax was taken into account in the valuation and a description of the methodology used;
- a description of all actuarial assumptions used in the valuation;
- disclosure of the name of the person who engaged the actuary and disclosure of any business relationship the actuary or the actuary's firm has with the pension plan sponsor, or the person.

The report on the valuation should include a statement that the present value has been computed in compliance with this standard of practice. If the actuary is unable to so state, the report must disclose those areas in which the valuation did not comply and reasons for noncompliance.

7. GUIDANCE

The Institute maintains a standing committee called "The Committee on the Division of Pension Benefits Upon Marriage Breakdown." The *Yearbook* lists membership and notes this committee's mandate as follows:

"Responsible for identifying key issues, preparing guidance for the assistance of members, the courts and parties involved, and is to consider the appropriateness of preparing recommendations on this subject."

An actuary may contact the chairperson or vice-chairperson of the committee to seek guidance on the interpretation of this standard of practice.

ERRATA FOR STANDARD OF PRACTICE

Revision to Standard of Practice for Marriage Breakdown Computations

Despite the best efforts of all concerned in reviewing the final standard of practice, two changes are necessary to the description of economic assumptions for valuation dates of marriage breakdown **at or before August 31, 1993** (shown on the top half of page 8).

These changes are shown in the following paragraph. A revised Blue Book page will be issued by the Secretariat in due course. Additions are shown in **BOLD SMALL CAPS**; deletions are shown in ~~strikeout~~. The revised wording is:

“The following sets forth applicable economic assumptions for valuation dates of marriage breakdown at or before **AUGUST 31, 1993**:

- For nonindexed pension, the interest rate for the first 15 years from the valuation date should be the month-end value of the nominal rate of interest on long-term Government of Canada bonds (CANSIM series B14013) in the ~~second~~ calendar month preceding the month in which the valuation date falls rounded to the next higher multiple of 0.50%. After the first 15 years, the interest rates should be 6.00%. Thus, if the valuation date is ~~April~~ **MARCH** 15, 19XX, and the February 19XX month-end CANSIM Series B14013 rate is 8.20%, an initial valuation rate of 8.50% applies.
- For pensions which are fully indexed (i.e., where the pension increases by the same percentage as the Consumer Price Index) in either the deferral period and/or while in course of payment, the net rate of interest should be set initially as the difference, rounded to the next multiple of 0.50%, between the interest rate applicable to nonindexed pensions (as described in the preceding paragraph, **PRIOR TO ROUNDING**) and the rate of increase in the Consumer Price Index on an annualized basis, determined by dividing the average of the monthly Consumer Price Index on an annualized, determined by dividing the average of the monthly Consumer Price Index for Canada (all items) for the month preceding the month in which the valuation date occurs, by the corresponding average Consumer Price Index for the same month one year earlier. The initial rate should apply for the first year and be reduced or increased in equal annual increments to a long-term net rate of 3.00% per year over a five-year period.”

APPENDIX C

CANADIAN INSTITUTE OF ACTUARIES

RECOMMENDATIONS FOR THE COMPUTATION OF TRANSFER VALUES FROM REGISTERED PENSION PLANS*

By authority of Council

Effective date: September 1, 1993

* Reproduced with permission of the Canadian Institute of Actuaries. The French version has been omitted.

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The page numbers given here refer to the page numbers in the original document. The pagination of the original document is indicated by numbers in square brackets throughout the following copy.

[p. 1]

INTRODUCTION

The Council of the Canadian Institute of Actuaries has approved the following recommendations for conduct of a member (hereinafter called **actuary**) when engaged to compute, or recommend the basis to be used for the computation of, the transfer value of a pension payable from a pension plan that is registered under the Income Tax Act (Canada) (hereinafter called a **plan**). The values determined in accordance with these recommendations do not represent the only method of determining the value of the entitlement of a plan member or a plan member's beneficiary (hereinafter collectively called **plan member**). However, smaller transfer values are not permitted, but larger transfer values would be permitted provided that they were required by the plan terms or applicable legislation, or by a plan administrator who is empowered to specify the basis on which transfer values are to be determined.

[p. 2]

SECTION 1 — APPLICATION

These recommendations apply to the computation of transfer values to be paid from a pension plan that is registered under the Income Tax Act (Canada) when the method of settlement is a lump sum payment in lieu of an immediate or deferred pension resulting from death or individual termination of plan membership, except for the specific circumstances which are described below in paragraphs (e) through (h). In particular, the recommendations apply:

- a) in a jurisdiction whether or not there is legislation in that jurisdiction which specifically provides for portability of pension benefit credits;
- b) regardless of limits imposed by the Income Tax Act (Canada) on amounts that may be transferred to other tax-sheltered retirement plans;
- c) under a reciprocal pension agreement between plan sponsors where the result of the reciprocal agreement is either to establish a pension amount determined on a money purchase basis or to establish an account balance under a money purchase provision of a plan, whether the account balance is to be converted immediately or subsequently into a pension; and

- d) to the determination of a lump sum payment from the pension plan in lieu of an immediate or deferred pension to which a plan member's former spouse is entitled after an assignment of the member's pension has been made as a result of divorce, marriage annulment, legal separation or court order.

The recommendations do not apply:

- e) under a reciprocal pension agreement between plan sponsors where the result of the reciprocal agreement is to provide defined pension benefits for the plan member;
- f) to the computation of the capitalized value of pension entitlements on marriage breakdown for purposes of lump-sum equalization payments (this is covered in another standard of practice);
- g) to pensions and deferred pensions payable from pension arrangements that are not registered under the Income Tax Act (Canada), including retirement compensation arrangements, unfunded pension arrangements and pension plans outside of Canada; or
- h) to the conversion of defined pension benefits to a money purchase arrangement where there is no termination of plan membership.

[p. 3]

Where the actuary uses assumptions or methods described in these recommendations to calculate a transfer value in a situation where these recommendations do not apply, the actuary should not state or imply that the transfer value has been computed in accordance with these recommendations.

Under a partial or complete plan termination, or where a plan member terminates membership after the age at which a plan member becomes eligible under the plan for an immediate pension, a *bona fide* annuity quotation applicable to the pension benefit may be substituted for the transfer value calculated herein.

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SECTION 2 — GENERAL PRINCIPLES

A. Reflect Financial Market Conditions

The underlying principle in these recommendations is that the transfer value should, to the extent possible, reflect financial market conditions. In view of the length of the period involved and the inherent complexities of financial markets, estimation of future market conditions is a difficult task and the transfer value arrived at by the actuary using these recommendations may ultimately be proven to have been either insufficient to produce the desired benefit or excessive.

B. Independent of Plan's Financial Position

The transfer value computed by the application of these recommendations is independent of the financial position of the pension plan. Applicable legislation or the plan provisions may attach conditions to the payment of a portion of the transfer value when the plan is less than fully funded on a plan termination basis.

C. Date of Computation

The transfer value should be computed as of the date on which the beneficiary becomes entitled to an immediate or deferred pension resulting from death or individual termination of plan membership, or as of such later date as may be determined either by legislation, by the plan rules, or by a plan administrator who is empowered to do so, on which the right to elect a transfer becomes effective (hereinafter called the **computation date**). Such transfer value should be adjusted in accordance with Section 4.

D. Reflect Full Benefit Entitlement

The transfer value must reflect the plan member's full benefit entitlement as a deferred or immediate pensioner, as may be applicable, determined under the terms of the pension plan. The death benefit which would have applied before commencement of a deferred pension plan should be reflected.

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Where, at the computation date, a plan member has the right as a deferred or immediate pensioner, as may be applicable, to optional forms of pension or optional commencement dates, and where such right is contingent on an action which is within the member's control and where it is reasonable to assume that the member will act so as to maximize the value of the benefit, the option which has the greatest value should be used in the determination of the transfer value — for example, where a member has terminated employment and, upon application, is eligible for a particular benefit that has a value, it is reasonable to assume that the member will apply for the benefit.

However, where such right is contingent upon an action which is within the member's control and where it is not reasonable to assume that the member will act so as to maximize the value of the benefit, an appropriate allowance should be made for the likelihood and timing of such action — for example, where a member is continuing in employment and is entitled to an unreduced pension that commences upon termination of employment, it may not be reasonable to assume that the member will immediately terminate employment in order to maximize the value of the benefit. In determining the likelihood and timing of such action, the actuary may use group data, and the actuary should be prepared to justify the allowance that has been made.

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SECTION 3 — ACTUARIAL ASSUMPTIONS

There are many types of immediate and deferred pensions, but two distinct classes or types have to be considered separately. The two classes are:

- nonindexed pensions
- indexed pensions

A. Demographic Assumptions

The demographic assumptions will be the same for all types of immediate and deferred pensions.

- **Mortality:** The actuary should use the GAM83 Table, as published on pages 880 and 881 of Volume XXXV of the *Transactions* of the Society of Actuaries.

While appropriate male and female rates would normally be applied, the actuary may calculate transfer values that do not vary according to the sex of the plan member where the actuary is required to do so by applicable legislation or by the provisions of the plan or by the plan administrator if the administrator is so empowered by the provisions of the plan. In this case, the actuary should adopt a blended mortality approach by either developing a mortality table based on a combination of male and female mortality rates, or computing the transfer value as a weighted average of the transfer value based on male mortality rates and that based on female mortality rates. The blended mortality approach should be appropriate for the particular plan. If the requirement that transfer values do not vary according to the sex of the plan member is legislated and applies only to benefits earned after a particular date or only to a sub-group of plan members, the actuary may extend the use of a blended mortality approach to transfer values of benefits earned prior to such date or to transfer values of benefits of all members only when prescribed by the provisions of the plan or by the plan administrator if the administrator is so empowered by the provisions of the plan.

- **Proportion married and age and mortality of spouse:** If the plan provides a contingent benefit only to the person who is the plan member's spouse at the date of termination of membership, the actual age of the spouse, if any, should be used in the computation. If this information cannot be obtained, an appropriate proportion married and age difference between the plan member and spouse should be assumed.

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Where the plan provides a contingent benefit to a plan member's spouse and a change in the member's marital status after the computation date is relevant to the determination of the transfer value, the actuary should make an appropriate assumption concerning the likelihood of there being an eligible spouse, and the age of that spouse, at the time of death.

In the event that the actuary is required to calculate transfer values that do not vary according to the sex of the member, and the actuary has developed a mortality table for the member based on a combination of male and female mortality rates, and if the plan provides a contingent benefit to the member's spouse, the approach for combining male and female mortality rates for the spouse should be consistent with the approach used for combining male and female mortality rates for the member. This may be illustrated by an example. Suppose that the actuary has adopted a mortality

table for the plan member that is based on a combination of 80% male mortality rates and 20% female mortality rates, and that the actuary is valuing a joint and survivor pension. The actuary should then use 20% male mortality rates and 80% female mortality rates for the spouse. If the actuary assumes that husbands are three years older than their wives on average, the assumed spouse's age would be 1.8 years younger than the member, regardless of the sex of the member (that is, 80% times 3 plus 20% times -3).

- **Retirement age:** The current age of the plan member should be used when valuing an immediate pension.

When valuing deferred pensions, the normal retirement age should be used, except in the situation where the terminated plan member has the right to elect an earlier commencement date and the consequent early retirement pension exceeds the amount which is of actuarial equivalent value to the pension payable at normal retirement age. In this situation, the retirement age should be determined based on the last paragraph of Section 2.

B. Economic Assumptions

The economic assumptions will vary depending on whether the pension is fully indexed, partially indexed or nonindexed. The transfer value of a fully or partially indexed pension should be at least equal to the transfer value applicable to the nonindexed pension in the same amount and having similar characteristics. The interest rates, prior to rounding, should be determined as follows:

[p. 8]

- For nonindexed pensions, the interest rate for the first 15 years from the computation date should be month-end value of the nominal rate of interest on long-term Government of Canada bonds (CANSIM series B14013) in the second calendar month preceding the month in which the computation date falls, adjusted as follows:
 - i) add 0.50%; and
 - ii) convert the resulting nominal rate, which is based on semiannual compounding, to the equivalent effective annual rate.

After the first 15 years, the effective annual rate should be 6.00%.

- For pensions which are fully indexed (i.e., where the pension increases by the same percentage as the Consumer Price Index) in both the deferral period and while in course of payment, the net rate of interest for the first 15 years from the computation date should be the month-end value of the real rate of interest on long-term Government of Canada real return bonds in the second calendar month preceding the month in which the computation date falls, adjusted as follows:
 - i) add 0.25%; and
 - ii) convert the resulting nominal rate, which is based on semiannual compounding, to the equivalent effective annual rate.

After the first 15 years, the effective annual rate should be 3.25%.

- For pensions which are partially indexed to increases in the Consumer Price Index, the actuary should determine the underlying rates of increase in the Consumer Price Index in the first 15 years and thereafter that make the above assumptions for nonindexed and fully indexed pensions internally consistent. The formula to be used for each future year is:

$(1 + \text{the deemed rate of Consumer Price Index increase in the year})$ equals

$(1 + \text{the interest rate applicable to that year for nonindexed pensions})$
divided by

$(1 + \text{the interest rate applicable to that year for fully indexed pensions})$.

The actuary should then determine the rates of pension escalation that would be produced by applying those rates of increase in the Consumer Price Index to the partial indexing formula of the plan. The interest rates applicable to nonindexed pensions should be appropriately reduced on a geometric basis to reflect the rates of pension escalation.

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- Where increases in pensions are related to increases in the average wage index, the actuary should assume that the average wage index will increase at rates that are one percentage point higher than the above-mentioned underlying rates of increase in the Consumer Price Index each year. The interest rates applicable to nonindexed pensions should be appropriately reduced on a geometric basis to reflect the rates of pension escalation.

- A pension that is indexed according to an excess interest approach involves increases that are linked to the excess of formula A over formula B, where A is some proportion of the rate of return on the pension fund or on a particular class of assets, and B is a base rate or some proportion of the rate of return on another asset class. The interest rate in each period should be equal to the interest rate applicable to a nonindexed pension reduced geometrically by the excess, if any, of the interest rate under formula A over the interest rate under formula B. In determining the interest rates under formula A and formula B, the interest rate applicable to a nonindexed pension should be used as a proxy for the rate of return on the pension fund and on any particular asset class for which the rate of return is expected to be equal to or greater than the rate of return on long-term provincial bonds. If the particular asset class is one in which the rate of return is expected to be less than the rate of return on long-term provincial bonds, the interest rate should be the interest rate applicable to a nonindexed pension, appropriately reduced to reflect the actuary's expectation of the difference between the rate of return on long-term provincial bonds and the rate of return on the particular asset class. In determining the expected rate of return on a particular asset class for this purpose, the actuary should be guided by a long-term historical averages without giving undue weight to recent experience.
- Where the benefit adjustments are based on one of the above approaches but are either modified by applying a maximum or minimum annual increase, with or without carryforward of excesses or deficiencies to later years, or modified by prohibiting a decrease in a year where the application of the formula would otherwise cause a decrease in pension, the actuary should adjust the interest rates otherwise applicable, based on the likelihood of the modification causing a material change in the pension payable in any year. In determining, such likelihood, the actuary should be guided by long-term historical

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averages without giving undue weight to recent experience. The actuary should be prepared to justify any such adjustment or lack of adjustment to the interest rates.

- Where increases in benefits are not determined by reference to increases in the Consumer Price Index, the actuary should ensure that the transfer value is not inconsistent with the values of nonindexed pensions and fully indexed pensions. For example, where an excess interest approach is used and is based on the excess of the fund rate of return of a low base rate such as 3.00%, the value should not differ materially from the value of a fully indexed pension.

The unrounded rates of interest determined as above should then be rounded to the nearest multiple of 0.25%.

A deferred pension that is indexed only after the expiry of the deferral period should be valued using the interest rate applicable to a nonindexed pension during the deferral period and the interest rate applicable to the particular type of indexed pension after the commencement date of the pension.

A deferred pension that is indexed only during the deferral period should be valued using the interest rate applicable to the particular type of indexing in the deferral period, and the interest rate applicable to a nonindexed pension after the pension commences.

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SECTION 4 — TRANSFER AFTER COMPUTATION DATE

The actuary should establish the period for which the transfer value applies before recomputation is required, taking into account the requirements of applicable legislation and the plan rules. The transfer value calculated in accordance with these recommendations should be adjusted for a reasonable market rate of interest between the computation date and the first of the month in which the payment is made. Transfer values paid after the end of such period should be recomputed on the basis of a new computation date.

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SECTION 5 — DISCLOSURE

When communicating to the plan sponsor a transfer value which the actuary has computed, the actuary shall provide:

- a) a description of the pension benefits to which the transfer value applies;
- b) a description of the actuarial assumptions used in determining the transfer value and the rate of interest to be credited between the computation date and the date of payment;
- c) a statement of the period for which the transfer value applies before recomputation is required;
- d) when the payment of a portion of the transfer value is subject to a condition based on the financial position of the plan, the additional contribution required for the payment of the full transfer value to be made or the recommended schedule for payment of the balance of the transfer value, if applicable; and
- e) a statement as to whether the value has been computed in accordance with these recommendations.

When communicating to the plan sponsor an actuarial basis to be used in determining transfer values, the actuary shall provide a statement that the actuarial basis is in accordance with these recommendations.

The following disclosure requirements are applicable where the use of transfer values (herein called **plan values**) that are different from those computed according to the preceding sections of these recommendations is required by the plan terms or applicable legislation, or by a plan administrator who is empowered to specify the basis on which transfer values are to be determined:

- (a) If the plan values are lower, the actuary should disclose that the transfer values so calculated are in accordance with the plan but not in accordance with the recommendations; and
- (b) If the plan values are higher, the actuary should disclose that the transfer values so calculated are in accordance with the plan and the recommendations.

Where the actuary is required to calculate transfer values that do not vary according to the sex of the plan member, and where that requirement applies only to benefits earned after a particular date or only to a sub-group of plan members, the actuary should describe the extent to which the actuary's blended mortality approach has been extended to benefits earned before the particular date or to benefits of all members, and the actuary should identify the authority for using this approach.

APPENDIX D

**LAW REFORM COMMISSION
OF BRITISH COLUMBIA**

**REPORT ON
DIVISION OF PENSIONS
ON MARRIAGE BREAKDOWN***

Draft Legislation and Regulations

* Reproduced with permission of the Law Reform Commission of British Columbia.

[p. 68]

DRAFT LEGISLATION:**DIVISION OF PENSIONS ON MARRIAGE BREAKDOWN****1. The *Family Relations Act* be amended

- (1) to provide that a court has jurisdiction to vary the manner in which a pension is divided under Part 3.1; and
- (2) to provide that where the division of a pension under Part 3.1 would be unfair, having regard to
 - (a) the factors set out in section 51, or
 - (b) the exclusion from division of the portion of a pension earned before the marriage

the court may divide the excluded portion between the spouse and member if it is inconvenient to adjust the division by reapportioning entitlement to another asset.

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2. The *Family Relations Act* be amended by adding a new Part 3.1 as follows:**PART 3.1****DIVISION OF PENSIONS****Definitions**

55.1 In this Part

“**administrator**” means the person or body who is considered to be an **administrator** under the *Pension Benefits Standards Act*,

** The pagination of the original document is indicated by numbers in square brackets throughout the following copy. **Bold face** is used to indicate that the term is defined in the draft legislation

“beneficiary” means a person or the estate of a **member** entitled under the terms of the **plan** to receive **preretirement** or **postretirement survivor benefits** under the **plan** on the death of the **member**,

[p. 70]

“benefit” means a **pension** or any other **benefit** under a **plan**, and includes a return of contributions, a transfer of the **commuted value** of a **pension**, **preretirement survivor benefits**, **postretirement survivor benefits**, postretirement adjustments to benefits and any payment in a series of payments that constitutes a **benefit**,

[p. 71]

“commuted value” means the value of a **benefit** determined in accordance with the regulations,

“defined benefit plan” means a **plan** that is not a **defined contribution plan** or a **hybrid plan**,

[p. 72]

“defined contribution plan” means a **plan** under which **benefits** are determined solely by reference to what is provided by

- (a) contributions made by a **member** and on a **members** behalf by an employer, and
- (b) **net investment returns** and other amounts allocated or to be allocated in respect of the contributions,

“disability benefit” means any monthly **benefit** paid to a **member** under a **plan** as a consequence of a disability,

“extraprovincial plan” means a **plan** that is not a **local plan**,

“hybrid plan” means a **plan** under which either

- (a) some but not all of the **benefits** are determined as if the **plan** were a **defined contribution plan**, or
- (b) the **member** can choose on retirement between having the **pension** based on either contributions or a defined benefit formula,

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“limited member” means a person designated under section 55.3,

“local plan” means a **plan** that is

- (a) established by the province,
- (b) required to be registered under the *Pension Benefits Standards Act*, or
- (c) subject to this Part
 - (i) by the terms of the **plan**,
 - (ii) by operation of legislation regulating the **plan**, or
 - (iii) by reason of a reciprocal agreement under the *Pension Benefits Standards Act*.

“matured pension” means a **pension** under which **benefits** are being paid to a retired **member** or **beneficiary** and includes a payment of **disability benefits** when the **member** reaches a prescribed age, and **“mature”** with reference to a pension has a corresponding meaning.

“member” means a person on whose behalf contributions to a **plan** have been made or who has a **vested** or **matured pension**,

[p. 74]

“net investment returns” means interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings,

“**pension**” means a series of payments pursuant to a **plan** that continues either for a term of years or for the life of a **member** or former **member**, whether or not it is afterward continued to any other person,

“**pensionable service**” means the months or parts of months in respect of which **pension** entitlement in of a **member** accrues, and includes **pensionable service** associated with **pension** entitlement earned by a **member** under another **plan**, that has been transferred to the credit of the **member**,

“**plan**” means a plan, scheme or arrangement organized and administered to provide **pensions** for employees and former employees,

[p. 75]

“**postretirement survivor benefits**” means lump sum or periodic **benefits** paid by a **plan** to a **beneficiary** when a **member** dies after the **pension** matures,

“**preretirement survivor benefits**” means lump sum or periodic **benefits** paid by a **plan** to a **beneficiary** when a **member** dies before the **pension** matures,

“**proportionate share**” means a fractional interest calculated in accordance with

- (a) the regulations,
- (b) a court order, or
- (c) the agreement of the **spouse** and **member**.

[p. 76]

“**retirement**” means the date a **member** commences to receive a pension under a **plan**, whether or not the receipt of **benefits** has been deferred, and “**retire**” has a corresponding meaning,

“**separate pension**” means the share of a member’s **pension** established in a separate account in favour of a **spouse** under section 55.5,

“**spouse**” means the **spouse** or former **spouse** of a **member** who is entitled to an interest in a **pension** in favour of the **member**, or compensation for foregoing such an interest, under Part 3 of the *Family Relations Act*,

“**transfer**” means, when referring to the payment of a **proportionate share** of the **commuted value** of a **pension** to the credit of a **spouse**, a **transfer** in accordance with the Regulations,

[p. 77]

“**vested pension**” means a **pension** under which a **member** has an unrestricted entitlement, or option of an entitlement, to the payment of **benefits** which will become payable in accordance with the **plan** or applicable legislation,

Application

55.21 (1) Where a **spouse** is entitled to an interest in a **pension** under Part 3 of the *Family Relations Act*,

- (a) the **spouse**’s share of the **pension**, and
- (b) the manner in which the **spouse**’s entitlement in the **pension** is to be satisfied

is determined in accordance with this Part.

[p. 78]

(2) This Part applies only where a **spouse** becomes entitled to an interest in family assets under Part 3

- (a) after this Part comes into force, or
- (b) before this Part comes into force but there has been no allocation of the **pension** between the **spouse** and the **member**
 - (i) by agreement, or
 - (ii) by court order

at the time this Part comes into force.

(3) A court order or an arrangement between the **spouse** and **member** which is silent on **pension** entitlement, but which represents a final settlement and separation of their financial affairs in recognition of the end of their marriage

is an allocation of the entire **pension** to the **member** by agreement or court order within the meaning of subsection (2)(b).

[p. 79]

Local plans:

Designation of a Limited Member

55.3 (1) A **spouse** may be designated to be a **limited member** of a **local plan** by delivering a prescribed Notice to the **plan**.

[p. 80]

(2) A **limited member** has the following rights:

- (a) to receive from the **plan** direct payment of a **separate pension** or a **proportionate share of benefits** paid under the pension, as the case may be, determined under this Part,
- (b) to enforce rights against the **plan** and recover damages for losses suffered as a result of a breach of a duty owed by the **plan** to the **limited member**,
- (c) except as modified by this Part, to all of the rights of a **member** under the *Pension Benefits Standards Act*, and
- (d) such additional rights as are set out in this Part.

[p. 81]

(3) Subject to the order of a court, a designation of **preretirement** or **postretirement survivor benefits** under the **member's pension** in favour of a **limited member** may not be changed without the **limited member's** consent until the **limited member** ceases to be a **limited member** or becomes entitled to a **separate pension**.

(4) Where the **commuted value** of the share of a **spouse** in the **pension** is transferred to the credit of the **spouse** under this Part, the **spouse** ceases to be a **limited member** of the **plan**.

[p. 82]

Local Plans:**Division of an Unmatured
Defined Contribution Plan**

55.4 If the **pension** to be divided is in a local **plan** and not yet **matured** and the **plan** is a **defined contribution plan**, the **spouse**, upon delivering a prescribed Notice to the **plan**, is entitled to have a prescribed portion of the member's account balance transferred from the **plan**.

Local Plans:**Division of an Unmatured
Defined Benefit Plan
By Account Split or
Transfer of Commuted Value**

55.5 If the **pension** to be divided is in a **local plan** and not yet **matured** and the **plan** is a **defined benefit plan**, the **spouse**, upon delivering the prescribed Notice to the **plan**, is entitled either

[p. 83]

- (a) before the member retires, to have a **proportionate share** of the **commuted value** of the **pension** transferred to the credit of the **spouse** from the **plan** at any time the **member** could have **retired**, or

[p. 84]

- (b) to receive a **separate pension**, determined in accordance with the regulations, from the **plan** when the **member** **retires**.

[p. 85]

Division of an**Extraprovincial Pension**

55.6 (1) If the **pension** to be divided is in an **extraprovincial plan**, the **spouse** is entitled to receive a **proportionate share** of **benefits** paid under the **pension** until the

- (a) death of the **spouse**, or
- (b) termination of the **pension**

whichever occurs first, and the **member** is a trustee for the **spouse** of the **proportionate share of benefits**.

(2) Notwithstanding a reduction of the **benefits** by reason of the death of the **member**, where **benefits** continue to be paid after the death of the **member** the amount paid to the **spouse** under subsection (1) must not be less than the amount paid before the reduction.

[p. 86]

(3) Subsection (1) does not apply where the **plan** or legislation establishing or regulating the **plan** provides an alternative method of satisfying the interest of the **spouse** in the **pension** unless, having regard to the principles that apply to **pension** division under this Part, the method would operate unfairly, in which case the court may order the **spouse's** share in the **pension** be satisfied under subsection (1).

Death of a Member or Limited Member

55.7 (1) Where the **member** dies before a **limited member** receives a share of the **pension** under section 55.5, the **limited member** is entitled to a **proportionate share of any preretirement survivor benefit payable under the member's pension**.

(2) Where the **member** dies after the **limited member** receives a share of the **pension** under section 55.5, the **limited member** is entitled to no further share of the **member's pension** except to the extent that the **member** has designated the **limited member** to be a **beneficiary of the pension**.

[p. 87]

(3) Where the **limited member** dies before the **member** and before receiving a share of the **pension** under section 55.5, the **plan** must transfer to the credit of the **limited member's** estate a **proportionate share of the commuted value of the pension**.

Matured Pensions in Local Plans: Benefit Split

55.8 (1) If the **pension** to be divided is a **matured pension** in a local **plan**, the **spouse**, upon delivering a prescribed Notice to the **plan** designating the **spouse** to be a limited **member**, is entitled to receive from the **plan** a **proportionate share of benefits** paid under the **pension** until the

- (a) death of the **spouse**, or
- (b) termination of the **pension**

whichever occurs first.

(2) Notwithstanding a reduction of the **benefits** by reason of the death of the **member**, where **benefits** continue to be paid after the death of the **member** the amount paid to the **spouse** under subsection (1) must not be less than the amount paid before the reduction.

[p. 88]

(3) A **local plan** that pays a **proportionate share of benefits** to a **spouse** must make separate source deductions with respect to income tax liabilities and the like for the **spouse's** share and the **member's** share of the **benefits**.

(4) Notwithstanding section 55.2(2), a **spouse** who, before this Part comes into force, is entitled to receive from a **member** payment of a **proportionate share of benefits** paid under the **matured pension** may require the **plan** to administer the division under subsection (1) by delivering a prescribed Notice to the **plan**.

Transfer of Commuted Value of a Separate Pension or Share of a Pension

55.9 Where a **limited member** is entitled to a **separate pension** or a **proportionate share of benefits** paid under the **pension**, a **plan** may require the **limited member** to accept a transfer of the **commuted value** of the **separate pension** or of the **proportionate share of the benefits**, as the case may be, in any case that the plan could have required a **member** to do so.

[p. 89]

Agreements

55.10 (1) A **spouse** may enter into a written agreement with a **member** respecting one or more of the following:

- (a) a revision of the formula for sharing a **pension**, provided that the share to the **spouse** does not leave the **member** with less than half
 - (i) the value the **pension** would have had, or
 - (ii) of the periodic **benefits** that would have been paid under the **pension on retirement**

if there had been no division of the **pension** between the **member** and the **spouse** or any former **spouse**.

- (b) a waiver by the **spouse** of any right or interest to share in a **member's pension** or any **benefit** under it,
- (c) a waiver by the **spouse** of any right or interest to a division of **pension** entitlement under the *Canada Pension Plan Act*, or

[p. 90]

- (d) the satisfaction of the **spouse's** interest in the **pension** by the payment of compensation in money or money's worth by the **member** to the **spouse**.

(2) Notwithstanding section 55.2(2), where a **spouse** becomes entitled to an interest in family assets under Part 3 before this Part comes into force, and the **pension** is to be divided by providing that the **member** pay the **spouse** a **proportionate share** of **benefits** paid under the **pension** but the **member** has not yet retired or the **spouse** is not yet receiving **benefits**, the **spouse** and **member** can agree to divide the **pension** in accordance with this Part and in that case a prescribed Notice issued pursuant to this Part is as valid as if entitlement to an interest in family assets arose after this Part comes into force, provided the Notice is delivered to the **plan** no later than two years after this Part comes into force.

[p. 91]

(3) Where the **spouse** and **member** agree, or a court orders pursuant to section 52, that the **member** will pay compensation to the **spouse** in satisfaction of part or all of the **spouse's** interest in the **pension**, then, unless the **spouse** and **member** otherwise agree or the court otherwise orders, the compensation payment shall be calculated in accordance with the regulations.

Administrative Costs

55.11 The **spouse** and **member** are responsible for paying to the **plan** a prescribed amount to offset administrative costs incurred by the **plan** in satisfying the share of the **spouse** under this Part, but a **spouse** or **member** who pays more than a half share may recover from the other the additional amount paid.

Information from Plan

55.12 A **limited member**, or a **spouse** claiming an interest in a **pension** who has delivered to the **plan** the prescribed Notice, is entitled to prescribed information from the **plan**.

[p. 92]

Trust of Survivor Benefits

55.13 Where a **spouse** is entitled to a share of **preretirement** or **postretirement survivor benefits** paid to another, the recipient holds them in trust for the **spouse**.

Division of other kinds of Plans

55.14 (1) If the **pension** to be divided is in a **local plan** and not yet **matured** and the **plan** is a **hybrid plan**,

- (a) to the extent that the **pension** in the **hybrid plan** is based, or the **member** may choose to have it based, on principles applicable to a **defined contribution plan**, the **pension** must be divided in accordance with the Act and Regulations as if it were in a **defined contribution plan**; and

- (b) the remainder of the **pension** must be divided in accordance with the Act and Regulations as if it were in a **defined benefit plan**.

[p. 93]

(2) Where, in the circumstances, the method of division required under this Act and Regulations is inappropriate because of the terms of the **plan**, the court may, notwithstanding the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting **pension** entitlement of the **spouse** and the **member** on marriage breakdown, direct an appropriate method of division of the **pension**, and the order of the court is binding on the **plan**.

Adjustment of Member's Pension

55.15 Where under this Act a **spouse**, or the **spouse's** estate, receives a share of a **member's pension** directly from a **plan**, the interest in the **pension** of

- (a) the **member**, or
- (b) any person claiming an interest through the **member**

must be adjusted as prescribed.

[p. 94]

Regulations

55.16 The Lieutenant Governor in Council may make regulations on:

- (a) methods and assumptions to be followed for the valuation and division of a **pension** and **benefits** at the end of a marriage,
- (b) the procedure to be followed by the **spouse**, **member** and **plan** when dividing a **pension** or satisfying a **spouse's** entitlement to a **pension**,
- (c) kinds of information a plan must make available to a spouse or **limited member** about a **plan** or **pension** entitlement and times when the information must be provided, and
- (d) setting out forms to be used under this Part.

[p. 95]

**Regulations to Part 3.1 of the
*Family Relations Act***

Calculation of Commuted Value

1. Where the Act under sections 55.5(a), 55.7(3), 55.9 or the Regulations requires calculation of the **commuted value** of a **pension** or a portion of a **pension**, it must be determined by reference to the **commuted value** calculated under section 33 of the *Pension Benefits Standards Act* that would have been transferred in favour of the **member** if the **member** terminated employment at the date of the transfer.

[p. 96]

**Calculation of
Proportionate Share**

2. Where the Act under sections 55.5(a), 55.6(1), 55.7(1), 55.7(3), 55.8, or 55.9 or the Regulations requires a determination of a **proportionate share** of a **pension**, a **benefit**, or the **commuted value** of a **pension**, the **proportionate share** must be determined by the following formula:

- (a) half of the **pensionable service** accumulated by the **member** from the date of marriage to the date the **spouse** becomes entitled to an interest in family assets under Part 3,

divided by

- (b) the total **pensionable service** accumulated by the **member** to the date
 - (i) the **spouse's** share is transferred from the **plan**,
 - (ii) the **spouse** begins to receive a **separate pension**, or
 - (iii) the **spouse** begins to receive a payment of **benefits** from the **member** or the **plan**

as the case may be.

[p. 97]

Determining a Limited Member's Separate Pension in a Local Defined Benefit Plan

3. A **separate pension** in favour of a **limited member** under s. 55.5 of the Act must be

- (a) a single life **pension**,
- (b) based on a **proportionate share** of the **pension** the **member** would have received had there been no division under this Part and had the **member** elected a **pension** in the unadjusted normal form provided under the **plan**, and
- (c) adjusted in accordance with actuarial principles to take into account any difference between the age of the **member** and the **limited member**.

[p. 98]

Adjustment of a Member's Pension

4. Where a **spouse** or the **spouse's** estate receives under the Act a **separate pension**, a transfer of a **proportionate share** of the **commuted value** of a **pension** or a share of **benefits** under the **pension**, the **plan** shall adjust the **member's pension** or **benefits** under it, as the case may be, by deducting from it the **proportionate share** (before the adjustment specified in Regulation 3(c)) transferred to the credit of, or paid to, the **spouse**.

Transfer of a Share From an Unmatured Pension in a Local Defined Contribution Plan

5. (1) Where a **local plan** that is a **defined contribution plan** is required under the Act to transfer an amount to the credit of a **spouse** of a **member**, the amount is calculated as

- (a) half of the contributions made to the **plan** to the credit of the **member** between the date of marriage and the date the **spouse** becomes entitled to an interest in family assets under Part 3, and
- (b) **net investment returns** allocated or which are to be allocated in respect of that portion of the contributions until the **spouse's** share is transferred by the **plan**.

[p. 99]

(2) Where the **administrator** can not obtain enough information about the account balance to perform the calculation required under (1), the amount in favour of the **spouse** is calculated as a **proportionate share** of

- (a) all of the contributions made to the plan to the credit of the **member** to the date the **spouse** becomes entitled to an interest in family assets under Part 3, and
- (b) **net investment returns** allocated or to be allocated in respect of the contributions referred to in paragraph (a) until the **spouse's** share is transferred by the **plan**.

Designation of Limited Member

6. Under the Act, a **spouse** may be designated a **limited member** of a **plan** where the **pension** to be divided is

- (a) an **unmatured pension** in a **local plan** that is a **defined benefit plan**,
or
- (b) a **matured pension** is a **local plan**.

[p. 100]

Notice to a Plan

- 7. (1) Where notice is required to be delivered to a **plan**
- (a) designating a **spouse** to be a **limited member**, or

- (b) requiring the transfer of a **spouse's** share of an **unmatured pension** in a **local plan** that is a **defined contribution plan**,

the Notice must be a validly completed Notice in Form A, signed by both the **spouse** and the **member**.

- (2) Where notice is required to be delivered to a **plan** advising a **plan** that
 - (a) a **spouse** who is not a **limited member** claims an interest in a **member's pension**.
 - (b) a **limited member** elects to have a **proportionate share** of the **commuted value** of all **unmatured pension** in a **local plan** that is a **defined benefit plan** transferred to the credit of the **limited member**, or

[p. 101]

- (c) a **limited member** elects to receive a **separate pension** on the retirement of the **member** under a **local plan** that is a **defined benefit plan**

the Notice must be a validly completed Notice in Form B, signed by the **spouse** or **limited member**, as the case may be.

**Where a Member will not Complete
a Form A or the Plan will not
Comply with the Notice**

8. (1) Where the **member** refuses to complete a Notice in Form A as required under the Act, or a **plan** fails to act upon a Notice within 30 days of its delivery, the **spouse** may apply to the court for an order

- (a) designating the **spouse** to be a **limited member** of a **plan**,
- (b) directing a payment out of the **commuted value** of a **spouse's** share from the **defined benefit plan**,
- (c) directing the **plan** to create a **separate pension** in favour of the **spouse**,
- (d) directing a payment out of a **spouse's** share from a **defined contribution plan** that has not yet **matured**, or

- (e) otherwise directing the **plan** to comply with the Notice.

as authorized under the Act.

[p. 102]

(2) The administrator of a **plan** affected by the order may apply to set aside or vary the order where either it directs a division of a **pension** that is not authorized under this Part, or does not provide sufficient information to carry out the court's direction.

(3) If a Notice is invalid, incomplete or fails to provide sufficient information to carry out the division of the **pension**, the **administrator** must refuse to comply with it by advising both the **spouse** and the **member** of the objection by ordinary mail at the addresses given on the Notice.

(4) Where an application is made to a court pursuant to Regulation 8(1) after a **plan** has refused or failed to comply with a Notice, notice of the application must be given to the **plan**.

(5) Neither the **administrator** nor the **plan** is liable for loss or damage arising in reliance upon an invalid Notice that appeared to be valid.

[p. 103]

Transfer out from a Plan

9. Where a **plan** is required under the Act to transfer an amount from a **plan** to the credit of a **spouse**, the **plan** must transfer the **spouse's** share to

- (a) another **plan** or fund [including a **plan** under the *British Columbia Retirement Savings Plan Act*],
- (b) a registered retirement savings plan,
- (c) an insurance company to purchase a deferred or immediate **pension**, or
- (d) a different account in the same **plan**

as may be authorized in accordance with section 33(2) of the *Pension Benefits Standards Act*.

[p. 104]

Administrative Costs

10. A **plan** is entitled to the following amounts to offset the administrative costs incurred in dealing with a **pension** under the Act:

- (a) for a **defined benefit plan**: \$400.
- (b) for a **defined contribution plan**: \$100.
- (c) for a **hybrid plan**: \$500.

Age at Which Disability Benefits Divided

11. A **disability benefit** being paid to a **member** qualifies as a benefit under a **matured pension** when the **member** reaches the age of 63.

[p. 105]

Information from Plan

12. (1) A **plan** must provide the following information to a person entitled to prescribed information under the Act within 30 days of a request by the person, no more frequently than once in each calendar year:

- (a) any information necessary to value the interest of a **member** in the **pension**, including information on options available to, and elections that may be made by, the **member** with respect to the **pension**, and
 - (b) any information or notice available to **members** of the **plan**.
- (2) A **plan** must give
- (a) a **limited member**, or

- (b) a **spouse** claiming an interest in a **pension** who has delivered to the **plan** the prescribed Notice,

30 days prior notice of any transaction relating to the **member's** interest in the **plan** by reason of the **member's**

- (i) death,
- (ii) retirement, or
- (iii) direction to the **plan**.

(3) After a **limited member** is in receipt of a **separate pension** under the Act, the **limited member** is entitled to information from the **plan** only about the **separate pension**.

[p. 106]

(4) Where notice is required under this section it must be given by ordinary mail sent to the last address provided by the person entitled to the notice.

Calculation of a Compensation Payment

13. (1) Where the Act under sections 52 or 55.10 or the Regulations provides for the satisfaction of **pension** entitlement by the payment of compensation by the **member** to the **spouse**, subject to the agreement of the **member** and the **spouse**, or the order of a court, it must be a **proportionate share** of a sum of money equalling the present value of the future **pension benefits** payable to the **member**.

(2) A determination of the present value under Regulation 13(1) must make reasonable provision for the following contingencies

- (a) the possibility that the **member** may terminate employment or die before **retirement**,
- (b) the possibility that the **member** may retire at an early, later or normal **retirement** date,

- (c) the possibility that **benefits** being divided as family assets and paid under the **plan** will increase, whether by an automatic formula or on an ad hoc basis, after the date selected for valuing the **benefits**, and

[p. 107]

- (d) to the extent that **benefits** being divided as family assets are related to future salary levels, the possibility that salary levels will increase after the date selected for valuing the **benefits**.

[(3)] Where the **pension** is not a **vested pension** at the date of valuation, the **spouse** may elect either to

- (a) postpone valuation until it is ascertained whether the **pension vests**, or
- (b) have the valuation proceed assuming the **pension will vest**, but adjusting it to take into account the contingency that the **member** may die or leave employment before **vesting**.

APPENDIX E

BRITISH COLUMBIA FAMILY RELATIONS AMENDMENT ACT, 1994*

* Reproduced with permission of the Queen's Printer of British Columbia.

Certified correct as passed Third Reading on the 17th day of May, 1994

Ian D. Izard, Law Clerk

ATTORNEY GENERAL

BILL 5 — 1994**

FAMILY RELATIONS AMENDMENT ACT, 1994

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. *Section 1 of the Family Relations Act, R.S.B.C. 1979, c 121, is amended in paragraph (c) of the definition of “spouse” by adding “or 3.1” after “under Part 3”.*
2. *Section 6(1) is amended by striking out “Part 3 and sections 65.1, 68.1” and substituting “Parts 3 and 3.1 and section 65.1”.*
3. *Section 20 is amended by adding “or 3.1” after “Part 3”.*
4. *Section 43 is amended*
 - (a) *in subsection (1) by striking out “Subject to this Part,” and substituting “Subject to this Part and Part 3.1,”, and*
 - (b) *in subsection (3)(a) by striking out “under this Part;” and substituting “under this Part or Part 3.1;”.*
5. *Section 51 is amended*
 - (a) *by striking out “section 43” wherever it appears and substituting “section 43, Part 3.1”, and*
 - (b) *by renumbering the section as section 51(1) and by adding the following:*

** Now S.B.C. 1994, c. 6.

- (2) If the division of a pension under Part 3.1 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
6. *Section 52(1) is amended by adding "or Part 3.1" after "proceedings under this Part" and by adding "or under Part 3.1," after "vesting of property under section 51,".*
7. *Section 53 is amended by adding "or Part 3.1" after "under this Part" wherever it appears.*
8. *The following Part is added:*

PART 3.1

DIVISION OF PENSION ENTITLEMENT

Definitions

5.1 (1) In this Part

"beneficiary" means a person, or the estate of a member, entitled under the terms of a plan to receive preretirement survivor benefits or postretirement survivor benefits on the death of the member;

"commuted value" means the value of a benefit determined in accordance with the *Pension Benefits Standards Act*;

"defined benefit plan" means a plan that is not a defined contribution plan or a hybrid plan;

"disability pension" means a benefit paid to a member under a plan as a consequence of a member's disability;

"extraprovincial plan" means a plan that is not a local plan;

"hybrid plan" means a plan under which

- (a) some benefits, but not all of the benefits, are determined as if the plan were a defined contribution plan, and
- (b) some benefits, but not all of the benefits, are determined by a defined benefit formula;

“limited member” means a person designated as a limited member of a local plan under section 55.3(1);

“local plan” means one of the following:

- (a) a plan that is established by the Province;
- (b) a plan that must be registered under the *Pension Benefits Standards Act*;
- (c) a plan that is subject to this Part
 - (i) by the terms of the plan,
 - (ii) by the operation of legislation that regulates the plan, or
 - (iii) by reason of a reciprocal agreement under the *Pension Benefits Standards Act*;

“matured pension”, or **“matured”** with reference to a pension, means a pension under which benefits are being paid to a retired member or a beneficiary and includes a payment of a disability pension when the member reaches a prescribed age;

“pension” means a series of payments that continue for the life of a member, whether or not it is afterward continued to any other person;

“plan” means a plan, scheme or arrangement organized and administered to provide pensions for members;

“postretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies after the pension matures;

“preretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies before the pension matures;

“proportionate share” means a fraction calculated in accordance with the regulations, the agreement of the spouse and member under section 55.92 or a court order;

“retirement” or **“retire”** means the date a member commences to receive a pension under a plan, whether or not the receipt of benefits has been deferred;

“separate pension” means the share of a member’s pension which is established in a separate account in favour of a spouse;

“transfer” means, when referring to the payment of a proportionate share of the commuted value of a pension to the credit of a spouse, a transfer made in accordance with the regulations.

(2) In this Part

- (a) **“administrator”**, **“benefit”**, **“defined contribution plan”**, **“former member”** and **“member”** have the same meaning as they have in section 1(1) of the *Pension Benefits Standards Act*,
- (b) **“member”** includes a former member, and
- (c) **“spouse”** includes a former spouse of a member.

Application

55.2 (1) Subject to subsection (2), if a spouse is entitled under Part 3 to an interest in a pension,

- (a) the spouse’s share of the pension, and
- (b) the manner in which the spouse’s entitlement in the pension is to be satisfied

must be determined in accordance with this Part.

(2) This Part applies only if a spouse

- (a) was entitled under Part 3 to an interest in a pension before the coming into force of this Part and on the day this Part comes into force there is no allocation of the pension by agreement between the spouse and the member or by court order, or
 - (b) becomes entitled under Part 3 to an interest in a pension after the coming into force of this Part.
- (3) An agreement between a spouse and member, or a court order, which is silent on pension entitlement but which represents a final settlement and separation of the financial affairs of the spouse and member in recognition of the end of their marriage is, for the purposes of subsection (2)(a), an allocation of the entire pension to the member by agreement or court order but nothing in this subsection affects a court's jurisdiction under Part 3 to review such an agreement or order.

Local Plans: limited members

55.3 (1) If a pension to be divided is

- (a) an unmatured pension in a local plan that is a defined benefit plan, or
- (b) a matured pension in a local plan,

a spouse may be designated a limited member of the local plan by delivering a notice in the prescribed form to the administrator.

(2) A limited member has the following rights:

- (a) to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be, as determined under this Part;
- (b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member;
- (c) except as modified by this Part, all of the rights of a member under the *Pension Benefits Standards Act*;

- (d) such additional rights as are set out in this Part.
- (3) Subject to an order of the Supreme Court, a designation of preretirement survivor benefits or postretirement survivor benefits under the member's pension in favour of a limited member may not be changed without the limited member's consent.
- (4) Subsection (3) applies until the limited member ceases to be a limited member or becomes entitled to a separate pension.
- (5) If the commuted value of the spouse's share in the pension is transferred under this Part to the credit of the spouse, the spouse ceases to be a limited member of the plan.

**Local plans: division of an
unmatured defined contribution plan**

55.4 If a pension to be divided is in a local plan and has not matured and the plan is a defined contribution plan, a spouse, by delivering a notice in the prescribed form to the administrator, is entitled to have a prescribed portion of the member's account balance transferred from the plan in accordance with the regulations.

**Local plans: division of an
unmatured defined benefit plan**

55.5 If a pension to be divided is in a local plan and has not matured and the plan is a defined benefit plan, a spouse, by delivering a notice in the prescribed form to the administrator,

- (a) this is entitled to have, before the member retires, a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse at any time the member is eligible to retire, or
- (b) is entitled to receive, when the member retires, a separate pension from the plan determined in accordance with the regulations.

Local plans: division of an unmatured hybrid plan

55.6 (1) If a pension to be divided is in a local plan and has not matured and the plan is a hybrid plan,

- (a) to the extent that the pension in the hybrid plan is based on, or the member may choose to have it based on, principles applicable to a defined contribution plan, the pension must be divided in accordance with Part and the regulations as if it were in a defined contribution plan, and
 - (b) the remainder of the pension must be divided in accordance with this Part and the regulations as if the pension were in a defined benefit plan.
- (2) If, in the circumstances, the method of division required under this Part and the regulations is inappropriate because of the terms of the plan, the Supreme Court may, despite the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting pension entitlement of the member and the spouse on marriage breakdown, direct an appropriate method of division of the pension and the order of the court is binding on the plan.

Local plans: benefit split of a matured pension

55.7 (1) If a pension to be divided is in a local plan and has matured, a spouse, by delivering a notice in the prescribed form under section 55.3(1), is entitled to receive from the plan a proportionate share of benefits paid under the pension until

- (a) the death of the spouse, or
- (b) the termination of the pension,

whichever occurs first.

- (2) Despite subsection (1), a spouse who is a designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.

- (3) A local plan that pays a proportionate share of benefits to a spouse must make separate source deductions with respect to deductions required under the *Income Tax Act* (Canada) for the spouse's share and the member's share of the benefits.
- (4) Despite section 55.2(2), a spouse who, before this Part came into force, is entitled to receive from a member payment of a proportionate share of benefits paid under a matured pension, may, by delivering a notice in the prescribed form to the administrator, require the plan to administer the division in accordance with this section.

Division of an extraprovincial plan

- 55.8** (1) If a pension to be divided is in an extraprovincial plan, a spouse is entitled to receive from the plan a proportionate share of benefits paid under the pension until
- (a) the death of the spouse, or
 - (b) the termination of the pension,
- whichever occurs first, and the member is a trustee of the proportionate share of benefits for the spouse.
- (2) Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
 - (3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the spouse in the pension.
 - (4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension be satisfied under subsection (1).

Death of a member or limited member

- 55.9** (1) If a member dies before the limited member receives a share of the pension under section 55.5, the limited member is entitled to a proportionate share of any preretirement survivor benefit payable under the member's pension.
- (2) If a member dies after the limited member receives a share of the pension under section 55.5, the limited member is entitled to no further share of the member's pension except to the extent that the member has designated the limited member to be a beneficiary of the pension.
- (3) If a limited member dies before the member and before receiving a share of the pension under section 55.5, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension.

Transfer of the commuted value of a separate pension or a share of a pension

55.91 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the pension, a plan may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share of the benefits, as the case may be, in the same manner that a plan can require a member to do so under section 40(1) of the *Pension Benefits Standards Act*.

Agreements

- 55.92** (1) A spouse may enter into a written agreement with a member respecting one or more of the following:
- (a) if there has been no division of a pension between the member and spouse, an arrangement for sharing the pension which departs from the proportionate shares required under this Act provided that the share to the spouse leaves the member with at least half of

- (i) the value the pension would have had, or
 - (ii) the periodic benefits that would have been paid under the pension on retirement;
 - (b) a waiver by the spouse of any right to or interest in a member's pension or any benefit under it;
 - (c) a waiver by the spouse of any right to or interest in a division of pension entitlement under the *Canada Pension Plan*;
 - (d) the satisfaction of the spouse's interest in the pension by the payment of compensation in money or money's worth by the member to the spouse.
- (2) Despite section 55.2(2), if
- (a) a spouse became entitled under Part 3 to an interest in family assets before the coming into force of this Part,
 - (b) the pension is to be divided by having the member pay the spouse a proportionate share of benefits payable under the pension, and
 - (c) the member has not yet retired or the spouse is not yet receiving benefits,

the spouse and member may agree to divide the pension in accordance with this Part and, in that case, a notice in the prescribed form issued under section 55.3(1) is as valid as if entitlement to an interest in family assets arose after the coming into force of this Part.

- (3) If the spouse and member agree, or the Supreme Court makes an order under section 52, that the member must pay compensation to the spouse in satisfaction of part or all of the spouse's interest in the pension, the compensation payment must be calculated in accordance with the regulations unless the spouse and member otherwise agree or the court otherwise orders.

- (4) If the plan and a spouse enter into an agreement under which the spouse accepts from the plan compensation, or a transfer of a share of the pension, in satisfaction of the spouse's interest in any circumstances not specifically dealt with under this Part, the compensation payment or amount transferred must be calculated in accordance with the regulations unless the Supreme Court otherwise orders.
- (5) If for the purposes of this Part, a form of notice or waiver is prescribed by the regulations, the notice or waiver is of no effect unless it is in the prescribed form.

Administrative costs

- 55.93** (1) The spouse and member are responsible for paying to the plan a prescribed amount to offset administrative costs incurred by the plan in satisfying the share of the spouse under this Part.
- (2) A spouse or member who pays more than a half share of the administrative costs may recover from the other the additional amount paid.

Information from plan

- 55.94** (1) A limited member, or a spouse claiming an interest in a pension who has delivered to the plan a notice in the prescribed form, is entitled to receive from the administrator
 - (a) at the time of marriage breakdown, and
 - (b) on an annual basis,
 prescribed information in respect of the plan.
- (2) Despite subsection (1), the Supreme Court may order that an administrator provide some or all of the information required by subsection (1) at any time.

Trust of survivor benefits

55.95 If a spouse is entitled to a share of preretirement survivor benefits or postretirement survivor benefits paid to another person, the recipient holds them in trust for the spouse.

Adjustment of member's pension

55.96 If under this Act a spouse or the spouse's estate receives a share of a member's pension directly from a plan, the interest in the pension of the member, or of any person claiming an interest through the member, must be adjusted in accordance with the regulations.

Regulations

55.97 The Lieutenant Governor in Council may make regulations for the following purposes and respecting the following matters:

- (a) the methods and assumptions to be followed for the valuation, division and transfer of a pension and benefits, or the calculation of any compensation payment or commuted value, at the end of a marriage
- (b) the procedures to be followed by a spouse, member and plan when dividing a pension or satisfying a spouse's entitlement to a pension;
- (c) the kinds of information a plan must make available to a spouse or limited member about a plan or pension entitlement and when the information must be provided, and requiring that different information be provided at different times;
- (d) the form, content and manner of giving any notice or waiver under this Part;
- (e) the procedures to be followed for failing to give or failing to comply with a notice under this Part;
- (f) the method of calculating the proportionate share of benefits under a plan;

- (g) the method of calculating a compensation payment or a transfer of a share of a pension for the purposes of section 55.92(4);
- (h) the prescribing of any age requirement under this Part;
- (i) the prescribing of the amount of any administrative cost.

9. *Part 4 is amended*

- (a) *in section 55.1 in the definition of “**maintenance order**” by striking out “sections 55 to 62.” and substituting “sections 56.1 to 62.”,*
- (b) *by renumbering section 55.1 as section 56, and*
- (c) *by renumbering section 56 as section 56.1.*

10. *Section 61(1) is amended by striking out “liability under section 56,” and substituting “liability under section 56.1,”.*

11. *Section 61.2(1) is amended by striking out “responsibility under section 56(1)” and substituting “responsibility under section 56.1(1)”.*

12. *Section 74(2) to (5) is repealed and the following substituted:*

- (2) Where a signed copy of a written agreement containing a provision respecting

- (a) the custody of or access to a child by a parent, or

- (b) the maintenance of a child by a parent or of a person by the person’s spouse

is filed in the Provincial Court in accordance with the Provincial Court (Family) Rules, the provision is enforceable under this Act or the *Family Maintenance Enforcement Act* as if it were contained in an order made under this Act.

- (3) Subsection (2) applies in respect of

- (a) a written agreement made after that subsection, as enacted by section 12 of the *Family Relations Amendment Act, 1994*, comes into force, and

- (b) a written agreement made before that subsection, as enacted by section 12 of the *Family Relations Amendment Act, 1994*, comes into force, but only if a consent in the form prescribed by the Provincial Court (Family) Rules is filed with the agreement.
- (4) A provision that is referred to in subsection (2) and is contained in a written agreement filed under this section may, at any time, be varied or rescinded
 - (a) by a new written agreement filed in the Provincial Court in accordance with the Provincial Court (Family) Rules, or
 - (b) by the Provincial Court, on application and subject to sections 20 and 62.
- (5) The filing of a written agreement under this section does not
 - (a) restrict or prevent a court from making an order for the same relief as is provided for in the agreement, or
 - (b) prevent the agreement from being filed or enforced in the Supreme Court under section 74.1.
- (5.1) Where a provision referred to in subsection (2) is contained in an agreement that was filed under this section before section 12 of the *Family Relations Amendment Act, 1994*, comes into force,
 - (a) the provision continues to be enforceable under this Act or the *Family Maintenance Enforcement Act* as if it were contained in an order made under this Act, and
 - (b) subsection (4) of this section applies.

13. Section 74.1(1) and (2) is repealed and the following substituted:

- (1) Where a signed copy of a written agreement containing a provision respecting
 - (a) the custody of or access to a child by a parent, or
 - (b) the maintenance of a child by a parent or of a person by the person's spouse

is filed in the Supreme Court in accordance with the Rules of Court, the provision is enforceable under this Act or the *Family Maintenance Enforcement Act* as if it were contained in an order made under this Act.

(2) Subsection (1) applies in respect of

- (a) a written agreement made after that subsection, as enacted by section 13 of the *Family Relations Amendment Act, 1994*, comes into force, and
- (b) a written agreement made before that subsection, as enacted by section 13 of the *Family Relations Amendment Act, 1994*, comes into force, but only if a consent in the form prescribed by the Supreme Court Rules is filed with the agreement.

(2.1) The filing of a written agreement under this section does not prevent the agreement from being filed, enforced, varied or rescinded in the Provincial Court under section 74.

(2.2) Where a provision referred to in subsection (1) is contained in an agreement that was filed under this section before section 13 of the *Family Relations Amendment Act, 1994*, comes into force, the provision continues to be enforceable under this Act or the *Family Maintenance Enforcement Act* as if the provision were contained in an order made under this Act.

14. *Section 83(7) and (8) is amended by striking out “section 74(3)(b) or (c),” and substituting “section 74,”.*

Transitional

15. For the purpose of section 55.94(1)(b) of the *Family Relations Act*, as enacted by section 8 of this Act, on or before December 31, 1995, an administrator is not required to provide information that the spouse or limited member is entitled to receive under that section unless the spouse or limited member makes a written request to the administrator or unless the plan otherwise agrees to provide the information on an annual basis.

Consequential Amendments

Pension Benefits Standards Act

16. Section 63(2)(b) of the Pension Benefits Standards Act, S.B.C. 1991, c. 15, is amended by adding the following subparagraph:

- (ii.1) a division of pension entitlement under Part 3.1 of the *Family Relations Act*,.

17. Section 64 is repealed and the following substituted:

Entitlement to benefits under a plan

64. The entitlement of any person to receive a benefit under a pension plan is subject to

- (a) entitlements arising under

- (i) a separation agreement, or
- (ii) an order made under Part 3 of the *Family Relations Act*, or a similar order of a court outside British Columbia enforceable in British Columbia,

that affect the payment or distribution of a person's benefits,
and

- (b) entitlements arising under a division of pension under Part 3.1 of the *Family Relations Act*.

Commencement

18. This Act comes into force by regulation of the Lieutenant Governor in Council.

